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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 716

GREAT LAKES TRANSIT CORPORATION,
PETITIONER,

vs.

INTERSTATE STEAMSHIP COMPANY AND ATLANTIC MUTUAL INSURANCE COMPANY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 6, 1937.

CERTIORARI GRANTED MARCH 8, 1937.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

CAPTION

Case No. 3168

Record of the proceedings of the District Court of the United States within and for the Eastern Division of the Northern District of Ohio, in the cause and matter hereinafter stated, the same being finally disposed of at a regular term of said court begun and held at the City of Cleveland, in said district, on the first Tuesday in April, being the 3rd day of said month, in the year of our Lord one thousand nine hundred and thirty-four and in the one hundred and fifty-eighth year of the Independence of the United States of America, to-wit, on Friday, the 27th day of July, A. D. 1934.

Present: Honorable S. H. West, United States District Judge.

No. 3168. Admiralty

INTERSTATE STEAMSHIP COMPANY, a Corporation,

vs.

GREAT LAKES TRANSIT CORPORATION, a Corporation

Intervenors:

Atlantic Mutual Insurance Company;
Home Insurance Company;
Union Marine & General Insurance Company (U. S.);
Sun Insurance Office (U. S.);
Eagle Star and British Dominions (U. S.);
Firemen's Fund Insurance Company;
Great American Insurance Company;
Lloyds, London;
Edinburgh Assurance Company;
British Traders' Insurance Company;
Royal Exchange Assurance;
Cornhill Insurance Company;
Sun Insurance Office;
Economic Insurance Company;
London Assurance.

[fol. 2] IN UNITED STATES DISTRICT COURT

LIBEL OF INTERSTATE STEAMSHIP COMPANY AGAINST GREAT LAKES TRANSIT CORPORATION, IN CASE No. 3168—Filed November 23, 1933

To the Honorable the Judges of said Court:

The libel and complaint of Interstate Steamship Company, a corporation, against the Great Lakes Transit Corporation, a corporation, in a cause of collision, civil and maritime, respectfully alleges and propounds as follows:

I

Libelant, the Interstate Steamship Company, is a corporation organized and existing under and by virtue of the laws of the State of West Virginia, and is and was at all times mentioned herein, sole owner of the Steamer Willis L. King, her engines, boilers, boats, machinery, tackle, apparel and furniture, and that no other person or corporation has or had any interest therein as owner.

II

Respondent, the Great Lakes Transit Corporation, is a corporation foreign to this State, and as such, as libelant is informed and believes, is and at all times herein mentioned was the owner of and operating the Steamer George D. Dixon, her engines, boilers, boats, machinery, tackle, apparel and furniture.

III

Said Steamers Willis L. King and George D. Dixon are and were at all times herein mentioned, vessels of the United States, each of several hundred tons burden, enrolled and licensed for the coasting trade, and engaged in the business of commerce and navigation upon the Great Lakes and their connecting and tributary waters.

IV

Libelant, on information and belief, alleges that on the 11th day of August, 1933, its said Steamer Willis L. King, being then and at all times hereinafter mentioned, staunch, strong and seaworthy, with a full complement of officers and crew properly stationed and attentive to their duties, was on a voyage from Superior, Wisconsin, to Huron, Ohio,

[fol. 3] laden with iron ore; when coming down St. Clair River a little after 5:00 P. M. on said date and approaching the mouth of Black River, at Port Huron, a one-blast bend or berth whistle was blown; when past Black River a heavy squall with wind, rain and dark atmosphere was seen below, whereupon the King was checked to moderate speed; shortly a fog whistle was heard from an upbound steamer on the starboard bow, whereupon the King answered with a fog whistle and then blew to her a two-blast passing signal; no answer was heard but shortly thereafter it cleared some and a steamer, which afterward proved to be the George D. Dixon, was seen coming upriver on a parallel course to the King and about a point and a half on the King's starboard bow, so that the steamers were in position to pass starboard to starboard; another two-blast passing signal was then blown by the King to the Dixon and the King starboarded some, but instead of the Dixon continuing as they were in perfect safety starboard to starboard, she was observed to start swinging toward the King, whereupon the King blew an alarm signal, backed full speed and blew another two-blast; the Dixon, instead of staying on her own side or stopping or backing continued on her swing toward the King and came across the King's bow at high speed, catching the King's bow about one-half of the way back on the Dixon's port side, doing considerable damage to both ships, and then continued on over onto the Canadian shore; the King stood by until it was seen that those on the Dixon were in no danger when she proceeded on, stopping at a dock on the American side below.

V

Libelant further alleges that said collision and damage occurred without any fault or negligence on the part of its said Steamer Willis L. King or her officers or crew, but on the contrary was occasioned and occurred solely by and through the fault and negligence of the said Steamer George D. Dixon and those who were then and there in charge of her; and not having full knowledge of all that occurred on board said Steamer George D. Dixon and therefore retaining the right to claim the benefit of any other faults which may develop on full hearing, now charges that said Steamer George D. Dixon, her officers and crew, were in fault in the following particulars:

[fol. 4] 1. That those in charge of her navigation were incompetent, negligent and inattentive to their duties.

2. That she failed to maintain proper and efficient lookout.

3. That she maintained too high a rate of speed under the conditions prevailing.

4. That when in a situation to pass starboard to starboard in perfect safety she, in the face of repeated two-blast whistles and alarm signals, sheered or steered from such position across the bow of the King.

5. That she did not timely check or stop or reverse or use any means to avoid said collision.

VI

Libelant further alleges that by reason of said collision and the negligence of the said Steamer George D. Dixon and her officers and crew, its Steamer Willis L. King was greatly damaged, and that in and about the proper and necessary repair thereto, together with incidental expenses connected therewith, libelant has been compelled to and has expended the sum of $46,864.35, and that by reason of said collision and the repairs rendered necessary thereby, the said steamer was necessarily delayed and libelant lost the use thereof for a priod of sixteen days, seven hours and fifty-two minutes, during which time the fair value for the use of said steamer amounted to the sum of $14,071.76, making a total damage to libelant of $60,936.11, for which, with interest thereon, libelant claims a lien on said Steamer George D. Dixon and prays for judgment against respondent Great Lakes Transit Corporation.

VII

That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore libelant prays that process in due form of law and according to the course and practice of this Honorable Court in causes of admiralty and maritime jurisdiction, may issue against the said respondent, Great Lakes Transit Corporation, citing it to appear and answer all and singular the

[fol. 5] premises; that this Honorable Court will be pleased to decree to libelant its loss and damages aforesaid, with interest and costs; that respondent, Great Lakes Transit Corporation, be decreed to pay said damages and loss with interest and costs and that libelant may have such other and further relief as in law and justice it may be entitled to receive.

Interstate Steamship Company, Libelant, by Holding, Duncan & Leckie, Its Proctors. Holding, Duncan & Leckie, Proctors for Libelant.

Duly sworn to by Frederick L. Leckie. Jurat omitted in printing.

[fol. 6] IN UNITED STATES DISTRICT COURT

ANSWER OF GREAT LAKES TRANSIT CORPORATION TO LIBEL OF INTERSTATE STEAMSHIP COMPANY, IN CASE NO. 3168—Filed January 4, 1934

To the Honorable the Judges of said Court:

And now comes Great Lakes Transit Corporation and for its Answer to the libel and complaint of Interstate Steamship Company:

First. Admits the allegations contained in Article numbered "I" of said libel and complaint.

Second. Admits the allegations contained in Article numbered "II" of said libel and complaint.

Third. Admits the allegations contained in Article numbered "III" of said libel and complaint.

Fourth. Admits that on the 11th day of August, 1933, the Steamer "Willis L. King" was on a voyage from Superior, Wisconsin, to Huron, Ohio, laden with iron ore, and that as she was coming down the St. Clair River after 5 o'clock in the afternoon on said date abreast Port Huron, a heavy squall with wind and rain came up, and that the weather was thick from rain and fog, and that a fog signal was heard from an upbound steamer, and that the Steamer "King" answered with a fog whistle, and that in the collision therein mentioned considerable damage was sustained by both the Steamer "Willis L. King" and the Steamer

"George D. Dixon," and that the Steamer "Dixon" grounded on the Canadian shore, and that the Steamer "King" stopped at a dock on the American side, and denies that it has any knowledge or information sufficient to form a belief as to whether prior to said collision the Steamer "King" was staunch, strong or seaworthy, and as to whether she had a full complement of officers or crew, and with respect to the remaining allegations contained in Article numbered "IV" of said libel and complaint, alleges upon information and belief, that they are false and untrue and are therefore denied, and says that the true facts are as hereinafter set forth.

Fifth. Upon information and belief, denies each and every allegation contained in Article numbered "V" of said libel and complaint.

[fol. 7] Sixth. Admits that the Steamer "Willis L. King" sustained damages, and that the steamer was delayed for the making of repairs, and denies that it has any knowledge or information sufficient to form a belief as to the extent of said damage and delay, and as to the cost of repairs, and as to the value of the use of said steamer during delay for repairs and, upon information and belief, denies that said collision or damage or delay were the result of any negligence of the Steamer "George D. Dixon," her officers or crew and, upon information and belief, denies that libellant has a lien on said Steamer "George D. Dixon" in the amount claimed, or in any other amount.

Seventh. Admits the admiralty and maritime jurisdiction of this Honorable Court, and upon information and belief denies that all or singular the premises of the said libel and complaint are true.

Further answering the allegations of said libel and complaint, alleges upon information and belief:

Eighth. That about 5:30 P. M. in the afternoon of August 11th, 1933, as the Steamer "George D. Dixon," being then stout, staunch and in all respects seaworthy, and manned with a full complement of officers and crew properly stationed and attentive to their duties, and laden with a cargo of sugar, rubber and general merchandise, was proceeding up the St. Clair River and about to come abreast the City of Port Huron, the weather became thick from heavy rain

and fog, and the Steamer "Dixon" at once reduced her speed to moderate speed and commenced the blowing of fog whistles; that the fog whistle of a steamer which proved to be the Steamer "Willis L. King" was then heard from up the river, and the "Dixon" responded with a fog signal and proceeded with caution under bare steerageway; thereupon, a one blast passing signal was heard from the "King," to which the "Dixon" responded with a one blast passing signal and directed her course to starboard in accordance therewith, and again blew her fog signal, continuing with caution and under bare steerageway, and while so directing her course to starboard there were two further exchanges of one blast passing signals between the Steamer "King" and the Steamer "Dixon," and the "Dixon" was proceeding slowly to starboard so that she was headed onto the Canadian shore and was well on the Canadian side of the river, when suddenly the Steamer "King" showed up close off the port [fol. 8] side of the Steamer "Dixon," coming at a high and unlawful rate of speed, and as she showed up the Steamer "King" blew a danger signal and a two blast passing signal, but she was so close upon the Steamer "Dixon" and coming at such a rate of speed that the "Dixon" was helpless to prevent the collision, and there was no time or opportunity for her to do other than to continue on her course toward the Canadian bank, and she blew a one blast signal indicating that course; that the Steamer "King," coming at a high and unlawful speed, struck stem on the port side of the Steamer "Dixon" about amidships, and that the Steamer "King" struck the "Dixon" with such force that her stem cut into and damaged plating on the port side of the "Dixon," damaged frames, buckled her decks, damaged her refrigerator house, and disabled the shaft of her steering gear.

That the said collision occurred abreast of the City of Port Huron but close to the Canadian shore, and the "Dixon" brought up on said shore bow on, and let go anchor and drifted downstream some distance and fetched up with her starboard side along the bank of the Canadian shore.

Ninth. Upon information and belief, that said collision occurred in waters with respect to which the Secretary of War by regulation duly adopted has provided that except

as to vessels under 100 gross tons and vessels making local stops, downbound vessel are required to navigate in the American channel and upbound vessels in the Canadian channel.

Tenth. That said collision occurred without any fault or want of care on the part of the Steamer "Dixon," or those engaged in her navigation, and reserving the right to urge such other and further faults as may appear upon a full hearing of this cause, that said collision was solely the result of faults and negligence of those engaged in navigating the Steamer "Willis L. King" in the following particulars:

(1) In that her master and crew were careless and inattentive to their duties.

(2) In that she maintained no proper lookout.

(3) In that she failed to navigate at a moderate speed on encountering thick weather.

(4) In that she failed to reduce her speed to bare steerageway, and failed to navigate with caution on hearing the Steamer "Dixon."

[fols. 9-14] 5. In that she failed to direct her course to starboard, in accordance with passing signals exchanged between the "King" and the "Dixon."

(6) In that she came into waters rightfully belonging to the Steamer "Dixon" for her navigation.

(7) In that she left the waters which she was bound to keep in as a downbound vessel, and came into the waters reserved for upbound vessels, in violation of regulation pertaining to said waters.

(8) In that she violated Rules 15, 17, 23, 26, 27 and 28 of the Act of Congress known as the White Law.

(9) In that she was navigated at and struck the Steamer "Dixon" while going at a negligent and unlawful rate of speed.

(10) In that her navigation was entirely without caution, and in gross disregard of the rules of navigation and prudent seamanship and the rights of others.

Wherefore, Respondent prays that the libel and complaint of said Interstate Steamship Company herein may be dismissed, and that respondent may go hence with its costs, and for such other and further relief as to law and justice may appertain.

Great Lakes Transit Corporation, by R. M. Russell, Treasurer. Brown, Ely & Richards, Proctors for Respondent, Office and P. O. Address, 1317 Chamber of Commerce, Buffalo, New York.

Duly sworn to by R. M. Russell. Jurat omitted in printing.

[fol. 15] In United States District Court, Northern District of Ohio, Eastern Division, ss.

Caption

Case No. 3170

Record of the proceedings of the District Court of the United States within and for the Eastern Division of the Northern District of Ohio, in the cause and matter hereinafter stated, the same being finally disposed of at a regular term of said court begun and held at the City of Cleveland, in said district, on the first Tuesday in April, being the 3rd day of said month, in the year of our Lord one thousand nine hundred and thirty-four and in the one hundred and fifty-eighth year of the Independence of the United States of America, to-wit, on Friday, the 27th day of July, A. D. 1934.

Present: Honorable S. H. West, U. S. District Judge.

No. 3170. Admiralty

GREAT LAKES TRANSIT CORPORATION, as Owner of the Steamer "George D. Dixon," and as Carrier and/or Bailee of Cargo Lately Laden on the Steamer "George D. Dixon,"

vs.

THE STEAMER WILLIS L. KING, Her Engines, Boilers, Boats, Machinery, Tackle, Apparel and Furniture,

and

INTERSTATE STEAMSHIP COMPANY, a Corporation,

GREAT LAKES TRANSIT COMPANY (Impleaded Respondent)

Intervenors:

Atlantic Mutual Insurance Company;
Home Insurance Company;
Union Marine & General Insurance Company (U. S.);
Sun Insurance Company (U. S.);
Eagle Star and British Dominions (U. S.);
Firemen's Fund Insurance Company;
Great American Insurance Company;
Lloyds, London;
Edinburgh Assurance Company;
British Traders' Insurance Company;
Royal Exchange Assurance;
Cornhill Insurance Company;
Sun Insurance Office;
Economic Insurance Company;
London Assurance.

[fol. 16] IN UNITED STATES DISTRICT COURT

LIBEL OF GREAT LAKES TRANSIT CORPORATION AGAINST STEAMER "WILLIS L. KING" AND INTERSTATE STEAMSHIP COMPANY, IN CASE No. 3170—Filed January 25, 1934

To the Honorable the District Judges of the United States for the Northern District of Ohio:

The libel and complaint of Great Lakes Transit Corporation, as owner of the Steamer "George D. Dixon" and as

carrier and/or bailee of cargo lately laden on the Steamer "George D. Dixon," against the Steamer "Willis L. King," her engines, boilers, boats, machinery, tackle, apparel and furniture, and Interstate Steamship Company, a corporation, in a cause of collision, civil and maritime, respectfully alleges and propounds as follows:

First. Libellant, Great Lakes Transit Corporation, is and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of New York, and engaged in the common carriage by water upon the Great Lakes of goods and merchandise, and is and at all times herein mentioned was the sole owner of the Steamer "George D. Dixon," her engines, boilers, boats, machinery, tackle, apparel and furniture, and that no other person or corporation has any interest in said Steamer "George D. Dixon" as owner.

Second. That the Steamer "Willis L. King" is a vessel of the United States, and at the times herein mentioned was engaged in commerce and navigation upon the Great Lakes and their connecting and tributary waters, and is now within the jurisdiction of this Honorable Court.

Third. Upon information and belief, that Interstate Steamship Company is and at all times herein mentioned was a corporation of the State of West Virginia, and owner and operator of the said Steamer "Willis L. King."

Fourth. That on the 9th day of August, 1933, the Steamer "George D. Dixon," with cargo laden thereon, departed the Port of Buffalo, New York, on a voyage for Milwaukee and Chicago, intending to stop at Erie, Detroit and Windsor [fol. 17] for additional cargo, and after stopping at said ports, the said vessel departed the Port of Windsor on the 10th day of August, 1933, and that she was laden with cargo consisting of sugar, rubber, package goods, and other goods and merchandise.

Fifth. That about 5:30 P. M. in the afternoon of August 11th, 1933, as the Steamer "George D. Dixon," being then stout, staunch and in all respects seaworthy, and manned with a full complement of officers and crew properly stationed and attentive to their duties, and laden as aforesaid, was proceeding up the St. Clair River and about to come

abreast the City of Port Huron, the weather became thick from heavy rain and fog, and the Steamer "Dixon" at once reduced her speed to moderate speed and commenced the blowing of fog whistles; that the fog whistle of a steamer which proved to be the Steamer "Willis L. King" was then heard from up the river, and the "Dixon" responded with a fog signal and proceeded with caution under bare steerageway; thereupon, a one blast passing signal was heard from the "King," to which the "Dixon" responded with a one blast passing signal and directed her course to starboard in accordance therewith, and again blew her fog signal, continuing with caution and under bare steerageway, and while so directing her course to starboard there were two further exchanges of one blast passing signals between the Steamer "King" and the Steamer "Dixon," and the "Dixon" was proceeding slowly to starboard so that she was headed onto the Canadian shore and was well on the Canadian side of the river, when suddenly the Steamer "King" showed up close off the port side of the Steamer "Dixon," coming at a high and unlawful rate of speed, and as she showed up the Steamer "King" blew a danger signal and a two blast passing signal, but she was so close upon the Steamer "Dixon" and coming at such a rate of speed that the "Dixon" was helpless to prevent the collision, and there was no time or opportunity for her to do other than to continue on her course toward the Canadian bank, and she blew a one blast signal indicating that course; that the Steamer "King," coming at a high and unlawful speed, struck stem on the port side of the Steamer "Dixon" about amidships, and that the Steamer "King" struck the "Dixon" with such force that her stem cut into and damaged plating on the port side of the "Dixon," damaged frames, buckled her decks, damaged her refrigerator house, [fol. 18] and disabled the shaft of her steering gear.

That the said collision occurred abreast of the City of Port Huron but close to the Canadian shore, and the "Dixon" brought up on said shore bow on, and let go anchor and drifted downstream some distance and fetched up with her starboard side along the bank of the Canadian shore.

Sixth. Upon information and belief, that said collision occurred in waters with respect to which the Secretary of

War by regulation duly adopted has provided that except as to vessels under 100 gross tons and vessels making local stops, downbound vessels are required to navigate in the American channel and upbound vessels in the Canadian channel.

Seventh. That said collision occurred without any fault or want of care on the part of the Steamer "Dixon," or those engaged in her navigation, and reserving the right to urge such other and further faults as may appear upon a full hearing of this cause, that said collision was solely the result of faults and negligence of those engaged in navigating the Steamer "Willis L. King" in the following particulars:

(1) In that her master and crew were careless and inattentive to their duties.

(2) In that she maintained no proper lookout.

(3) In that she failed to navigate at a moderate speed on encountering thick weather.

(4) In that she failed to reduce her speed to bare steerageway, and failed to navigate with caution on hearing the Steamer "Dixon."

(5) In that she failed to direct her course to starboard, in accordance with passing signals exchanged between the "King" and the "Dixon."

(6) In that she came into waters rightfully belonging to the Steamer "Dixon" for her navigation.

(7) In that she left the waters which she was bound to keep in as a downbound vessel, and came into the waters reserved for upbound vessels, in violation of regulation pertaining to said waters.

[fol. 19] (8) In that she violated Rules 15, 17, 23, 26, 27 and 28 of the Act of Congress known as the White Law.

(9) In that she was navigated at and struck the Steamer "Dixon" while going at a negligent and unlawful rate of speed.

(10) In that her navigation was entirely without caution, and in gross disregard of the rules of navigation and prudent seamanship and the rights of others.

Eighth. Upon information and belief, that as result of the collision, the Steamer "Dixon" commenced to take in water through her port side, and the services of a diver were employed to temporarily stop the leaks, and said vessel was so severely damaged that it was necessary and advisable that the vessel transfer her cargo for forwarding, and after making temporary repairs to her steering gear to enable her to navigate the vessel, after stopping at Port Huron, returned to Detroit and made fast at her terminal dock at that port, and her cargo was thereupon discharged; that some of her cargo was damaged through water gaining entrance through port side of the vessel where the port side was damaged from the collision, and some of the cargo became damaged from the force of the collision, and some became damaged from water through the breaking of a pipe in sanitary line in the collision and through the opening up of the deck of the vessel in the collision so that outside moisture got in and upon the cargo; that it was found necessary and advisable to dispose of some of the cargo without forwarding to destination, and the balance was loaded into the Steamer "William J. Conners," employed for that purpose and carried to destination.

Ninth. Upon information and belief, that solely as a result of the faults and negligence of the Steamer "Willis L. King," and the servants and agents of the Interstate Steamship Company in the navigation of said steamer as aforesaid, the Steamer "Dixon" was severely damaged in and about her plates, frames, decks, houses and other parts of the vessel in the collision, and was damaged in the course of unloading and transferring cargo, and libellant was put to expense in accomplishing the safe return of said steamer to Detroit and making transfer of cargo, in the employ-
[fol. 20] ment of the Steamer "William J. Conners" to deliver said cargo to destination, and lost the earnings of the Steamer "George D. Dixon" on the voyage on which she was engaged at the time of said collision, and was deprived of her use and earnings during the period in which repair was made of the damage resulting from the collision, and the cargo of said steamer sustained loss and large damage, so that libellant, individually, in respect of the aforesaid damage to the Steamer "Dixon," loss of earnings and use, and expenses, and cargo loss and damage and as car-

rier and/or bailee of the said cargo, has sustained damage in a sum as nearly as the same can now be estimated, amounting to One Hundred Twenty Thousand Dollars ($120,000.00) and interest, for which amount libellant has and claims a lien against the Steamer "Willis L. King," her engines, boilers, boats, machinery, tackle, apparel and furniture.

Tenth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, libellant prays:

(1) That process in due form of law according to the rules and practice of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against the Steamer "Willis L. King," her engines, boilers, boats, machinery, tackle, apparel and furniture, and against any and all persons having or claiming to have any interest therein; that they may be cited to appear and answer all and singular the matters aforesaid;

(2) That citation in due form of law may issue against respondent, Interstate Steamship Company, citing it to appear and answer all and singular the matters aforesaid, and that if it cannot be found within this District, that its goods and chattels within this District may be attached by process of foreign attachment for the sum sued for in this libel, with interest and costs;

(3) That a decree may be entered herein in favor of the libellant against the said respondent and against the said Steamer "Willis L. King," her engines, boilers, etc., for the amount of libellant's damages, as set forth, together with interest thereon, and libellant's costs and disbursements, and that the said steamer, her engines, etc. may be condemned and sold to pay the same;

[fol. 21] (4) And that the Court will grant the libellant such other and further relief in the premises as in law and justice it may be entitled to receive.

Great Lakes Transit Corporation, Libellant, by W. R. Evans, Comptroller. Brown, Ely & Richards, and Stanley & Gidley, Buffalo, New York, Proctors for Libellant.

Duly sworn to by W. R. Evans. Jurat omitted in printing.

[fol. 22] IN UNITED STATES DISTRICT COURT

CLAIM OF RESPONDENT AND CLAIMANT, INTERSTATE STEAMSHIP COMPANY, IN CASE NO. 3170—Filed February 13, 1934

Now comes Interstate Steamship Company, and for its claim herein alleges that it is a corporation duly organized and existing under and by virtue of the laws of the State of West Virginia and is the sole, true and lawful owner of the Steamer Willis L. King, her engines, boilers, boats, machinery, tackle, apparel and furniture, and prays that it be allowed to defend herein accordingly.

Interstate Steamship Company, by Holding, Duncan & Leckie. Holding, Duncan & Leckie, Proctors for Respondent and Claimant, Interstate Steamship Company.

Duly sworn to by Lee C. Hinslea. Jurat omitted in printing.

[fol. 23] IN UNITED STATES DISTRICT COURT

ANSWER TO LIBEL FILED BY GREAT LAKES TRANSIT CORPORATION, IN CASE NO. 3170—Filed February 13, 1934

To the Honorable the Judges of said Court:

Now comes the Interstate Steamship Company, a corporation, as claimant for the Steamer Willis L. King and as respondent, and for its answer to the libel and complaint of Great Lakes Transit Corporation, as owner of the Steamer George D. Dixon and as carrier and/or bailee of cargo lately laden on the Steamer George D. Dixon, says:

I

It admits the allegations contained in Article First of said libel and complaint.

II

It admits the allegations contained in Article Second of said libel and complaint.

III

It admits the allegations contained in Article Third of said libel and complaint.

IV

Having no information as to the allegations contained in Article Fourth of said libel and complaint, it denies each and every allegation contained in said Article Fourth of said libel and complaint.

V

It admits that on August 11, 1933, said Steamer George D. Dixon was proceeding up the St. Clair River when the weather became thick from heavy rain and fog, and further admits that said Steamer Willis L. King and Steamer George D. Dixon were in a collision, but the other allegations of said Article Fifth are for the most part wrongly stated and are therefore denied, and claimant and respondent says that the true facts are as hereinafter set forth.

VI

Upon information and belief, respondent and claimant denies each and every allegation contained in Article Sixth of said libel and complaint.

[fol. 24]

VII

Upon information and belief, respondent and claimant denies each and every allegation contained in Article Seventh of said libel and complaint.

VIII

Claimant and respondent while admitting that the Steamer George D. Dixon sustained some damage by reason of said collision does not have knowledge or information respecting the allegations of Article Eighth of the libel and complaint and therefore denies the same and demands strict proof thereof.

IX

Claimant and respondent while admitting that the Steamer George D. Dixon sustained some damage by rea-

son of said collision, does not have sufficient knowledge or information to form a belief as to the extent of the damage or any of the other allegations contained in said Article Ninth of said libel and complaint and therefore denies the same, and demands strict proof thereof.

X

Claimant and respondent deny the allegations of Article Tenth except admitting the jurisdiction of this Honorable Court.

XI

Further answering the allegations of said libel and complaint claimant and respondent alleges upon information and belief that the facts regarding said collision are that on the 11th day of August, 1933, its said Steamer Willis L. King, being then and at all times hereinafter mentioned, staunch, strong and seaworthy, with a full complement of officers and crew properly stationed and attentive to their duties, was on a voyage from Superior, Wisconsin, to Huron, Ohio, laden with iron ore; when coming down St. Clair River a little after 5:00 P. M. on said date, and approaching the mouth of Black River, at Port Huron, a one-blast bend of berth whistle was blown, when past Black River a heavy squall with wind, rain and dark atmosphere was seen below, whereupon the King was checked to moderate speed; shortly a fog whistle was heard from an upbound steamer on the starboard bow, whereupon the King [fol. 25] answered with a fog whistle and then blew to her a two-blast passing signal; no answer was heard but shortly thereafter it cleared some and a steamer, which afterward proved to be the George D. Dixon, was seen coming upriver on a parallel course to the King and about a point and a half on the King's starboard bow, so that the steamers were in position to pass starboard to starboard; another two-blast passing signal was then blown by the King to the Dixon and the King starboarded some, but instead of the Dixon continuing as they were in perfect safety starboard to starboard, she was observed to start swinging toward the King, whereupon the King blew an alarm signal, backed full speed and blew another two-blast; the Dixon, instead of staying on her own side or stopping or backing, continued on her swing toward the King and came across

the King's bow at high speed, catching the King's bow about one-half of the way back on the Dixon's port side, doing considerable damage to both ships, and then continued on over onto the Canadian shore; the King stood by until it was seen that those on the Dixon were in no danger, when she proceeded on, stopping at a dock on the American side below.

XII

Claimant and respondent further alleges that said collision and damage occurred without any fault or negligence on the part of its said Steamer Willis L. King, or her officers or crew, but on the contrary was occasioned and occurred solely by and through the fault and negligence of the said Steamer George D. Dixon and those who were then and there in charge of her; and not having full knowledge of all that occurred on board said Steamer George D. Dixon and therefore reserving the right to claim the benefit of any other faults which may develop on full hearing, now charges that said Steamer George D. Dixon, her officers and crew, were in fault in the following particulars:

1. That those in charge of her navigation were incompetent, negligent and inattentive to their duties.

2. That she failed to maintain proper and efficient lookout.

3. That she maintained too high a rate of speed under the conditions prevailing.

4. That when in a situation to pass starboard to starboard in perfect safety she, in the face of repeated two-[fols. 26-33] blast whistles and alarm signals, sheered or steered from such position across the bow of the King.

5. That she did not timely check or stop or reverse or use any means to avoid said collision.

Wherefore claimant and respondent prays that the libel and complaint of said Great Lakes Transit Corporation herein may be dismissed and that claimant and respondent may go hence with its costs, and for such other and further relief as to law and justice may appertain.

Interstate Steamship Company, by Holding, Duncan & Leckie. Holding, Duncan & Leckie, Proctors for Respondent and Claimant, Interstate Steamship Company.

Duly sworn to by Lee C. Hinslea. Jurat omitted in printing.

[fol. 34] IN UNITED STATES DISTRICT COURT

PETITION UNDER THE 56TH ADMIRALTY RULE TO BRING IN GREAT LAKES TRANSIT CORPORATION, OWNER OF THE STEAMER GEORGE D. DIXON, AS CARRIER AND/OR BAILEE OF CARGO TO ANSWER CARGO CLAIM, IN CASE NO. 3170—Filed February 13, 1934

To the Honorable, the Judges of said Court:

The petition of the Interstate Steamship Company, as owner and claimant of the steamer Willis L. King, and as respondent, respectfully shows:

[fol. 35] I

That petitioner is a corporation organized and existing under and by virtue of the laws of the state of West Virginia, and is and was at all times mentioned herein, sole owner of the steamer Willis L. King, her engines, boilers, boats, machinery, tackle, apparel and furniture, and that no other person or corporation has or had any interest therein as owner.

II

That on or about the 25th day of January, 1934, a libel was filed in this Court by Great Lakes Transit Corporation, owner of the steamer George D. Dixon, as carrier and/or Bailee of cargo lately laden on the steamer George D. Dixon, as libelant, against the steamer Willis L. King and the Interstate Steamship Company, a corporation, claiming that on the 11th day of August, 1933, while said steamer George D. Dixon was laden with a cargo of sugar, rubber, package goods and other goods and merchandise, and bound up the St. Clair River, said cargo sustained considerable damage as a result of a collision between said steamer Willis L. King and said steamer George D. Dixon, and as a result of said injury is claiming damages and cargo loss, the exact amount of which is not stated in the libel, the allegation of the libel being that the total damage to the steamer Dixon and to cargo amounted, as nearly as could be estimated, to $120,000.00, but petitioner avers that it is informed that libelant claims a considerable proportion of the total claimed dam-

age and loss to have been damage to and loss of cargo; said libel further alleges that said collision and the resulting damages and loss were due solely to the negligence, carelessness and want of skill of those in charge of the said steamer Willis L. King in the particulars in said libel set forth.

III

That the facts regarding said collision are that on the 11th day of August, 1933, the said steamer Willis L. King, being then and at all times hereinafter mentioned, staunch, strong and seaworthy, with a full complement of officers and crew properly stationed and attentive to their duties, was on a voyage from Superior, Wisconsin, to Huron, Ohio, laden with iron ore; that when coming down St. Clair River a little after 5:00 P. M. on said date, and approaching the [fol. 36] mouth of Black River, at Port Huron, a one-blast bend or berth whistle was blown; when past Black River a heavy squall with wind, rain and dark atmosphere was seen below, whereupon the King was checked to moderate speed; shortly a fog whistle was heard from an upbound steamer on the starboard bow, whereupon the King answered with a fog whistle and then blew to her a two-blast passing signal; no answer was heard but shortly thereafter it cleared some and a steamer, which afterward proved to be the George D. Dixon, was seen coming upriver on a parallel course to the King and about a point and a half on the King's starboard bow, so that the steamers were in position to pass starboard to starboard; another two-blast passing signal was then blown by the King to the Dixon and the King starboarded some, but instead of the Dixon continuing as they were in perfect safety starboard to starboard, she was observed to start swinging toward the King whereupon the King blew an alarm signal, backed full speed and blew another two-blast; the Dixon, instead of staying on her own side or stopping or backing, continued on her swing toward the King and came across the King's bow at high speed, catching the King's bow about one-half of the way back on the Dixon's port side, doing considerable damage to both ships, and then continued on over onto the Canadian shore; the King stood by until it was seen that those on the Dixon were in no danger, when she proceeded on, stopping at a dock on the American side below.

IV

Petitioner, on information and belief, alleges that said collision occurred without any fault or negligence on the part of said steamer Willis L. King or her officers or crew, but on the contrary was occasioned and occurred solely by and through the fault and negligence of the steamer George D. Dixon and those who were then and there in charge of her, and reserving the right to urge such other and further faults as may appear upon a full hearing of this cause, now charges that the steamer George D. Dixon was at fault for said collision in the following particulars:

1. That those in charge of her navigation were incompetent, negligent and inattentive to their duties.

[fol. 37] 2. That she failed to maintain proper and efficient lookout.

3. That she maintained too high a rate of speed under the conditions prevailing.

4. That when in a situation to pass starboard to starboard in perfect safety, she, in the face of repeated two-blast whistles and alarm signals, sheered or steered from such position across the bow of the King.

5. That she did not timely check or stop or reverse or use any means to avoid said collision.

V

That said collision and any damage or cargo loss sustained on account thereof by the Great Lakes Transit Corporation as carrier and/or bailee of cargo laden on said Steamer George D. Dixon, were solely the result of the fault and negligence of the steamer George D. Dixon, and those in charge of her, as hereinabove set forth; and that said Great Lakes Transit Corporation, the owner of said steamer George D. Dixon, as carrier and/or bailee of cargo lately laden on said steamer George D. Dixon, being the same cargo on board said steamer George D. Dixon when that vessel was in the collision with the steamer Willis L. King that is mentioned in the libel, ought to be proceeded against in this suit.

VI

That service has been had upon Great Lakes Transit Corporation, owner of the steamer George D. Dixon, in an action in admiralty in this Court, No. 3168, brought by said Interstate Steamship Company, as owner of the steamer Willis L. King to recover on account of the same collision mentioned in this petition; and that cause is to be consolidated with this for trial, and that said Great Lakes Transit Corporation is within the jurisdicton of ths Honorable Court.

VII

That all and singlar the premises are true and within the jurisdiction of this Honorable Court.

Wherefore, petitioner prays that process in due form of law and according to the course and practice of this Honorable Court in causes of admiralty and maritime jurisdiction [fol. 38] and in accordance with Rule 56 of the Rules of Admiralty prescribed by the Supreme Court of the United States, may issue against the said Great Lakes Transit Corporation, owner of the steamer George D. Dixon, as carrier and/or bailee of cargo lately laden on said steamer George D. Dixon, being the same cargo on board said steamer George D. Dixon when that vessel was in the collision with the steamer Willis L. King that is mentioned in the libel, citing it to appear and answer all and singular the premises, and particularly to answer this petition; that this Court will dismiss the libel against the steamer Willis L. King and Interstate Steamship Company, and will hold the Great Lakes Transit Corporation and/or the steamer George D. Dixon solely at fault and responsible for said collision, and that it will make such other and further order and decree as to law and justice may appertain.

Interstate Steamship Company, by Holding, Duncan & Leckie. Holding, Duncan & Leckie, 1970 Union Trust Building, and Thomas H. Garry, Proctors for Interstate Steamship Company.

Duly sworn to by Lee C. Hinslea. Jurat omitted in printing.

[fol. 39] IN UNITED STATES DISTRICT COURT

ANSWER OF GREAT LAKES TRANSIT CORPORATION AS OWNER OF THE STEAMER "GEORGE D. DIXON," AND AS IMPLEADED RESPONDENT, TO ITS LIBEL AND COMPLAINT AS CARRIER AND/OR BAILEE OF CARGO, IN CASE No. 3170—Filed February 15, 1934

To the Honorable the District Judges of the United States for the Northern District of Ohio:

And now comes Great Lakes Transit Corporation, as owner of the Steamer "George D. Dixon," and as impleaded respondent under the petition of the Interstate Steamship Company under the 56th Admiralty Rule to bring in said Great Lakes Transit Corporation as owner of the Steamer "George D. Dixon" to answer cargo claim, for its answer to its own libel and complaint as carrier and/or bailee of cargo lately laden on the Steamer "George D. Dixon":

Admits each and every allegation of the libel and complaint of Great Lakes Transit Corporation, as owner of the Steamer "George D. Dixon," and as carrier and/or bailee of cargo lately laden on the Steamer "George D. Dixon."

Wherefore, said Great Lakes Transit Corporation prays for the relief asked for in said libel and complaint, and that the petition of said Interstate Steamship Company may be dismissed, and for such other and further relief as to law and justice may appertain.

Great Lakes Transit Corporation, by W. R. Evans, Comptroller. Brown, Ely & Richards, 1317 Chamber of Commerce, Buffalo, New York, and Stanley & Gidley, Marine Trust Building, Buffalo, New York, Proctors for Great Lakes Transit Corporation.

[fol. 40] *Duly sworn to by W. R. Evans. Jurat omitted in printing.*

In United States District Court

Answer of Great Lakes Transit Corporation to the Petition of Interstate Steamship Company under the 56th Admiralty Rule to Bring in Great Lakes Transit Corporation to Answer Cargo Claim, in Case No. 3170—Filed February 15, 1934

To the Honorable the District Judges of the United States for the Northern District of Ohio:

And now comes Great Lakes Transit Corporation, as Owner of the Steamer "George D. Dixon," and for its answer to the petition of Interstate Steamship Company under the 56th Admiralty Rule to bring in Great Lakes [fol. 41] Transit Corporation, owner of the Steamer "George D. Dixon" as carrier and/or bailee of cargo, to answer cargo claim:

First. Admits the allegations contained in Article numbered "I" of said petition.

Second. Admits the allegations contained in Article numbered "II" of said petition.

Third. Admits that on the 11th day of August, 1933, the Steamer "Willis L. King" was on a voyage from Superior, Wisconsin, to Huron, Ohio, laden with iron ore, and that as she was coming down the St. Clair River after 5 o'clock in the afternoon on said date abreast Port Huron, a heavy squall with wind and rain came up, and that the weather was thick from rain and fog, and that a fog signal was heard from an upbound steamer, and that the Steamer "King" answered with a fog whistle, and that in the collision therein mentioned considerable damage was sustained by both the Steamer "Willis L. King" and the Steamer "George D. Dixon," and that the Steamer "Dixon" grounded on the Canadian shore, and that the Steamer "King" stopped at a dock on the American side, and denies that it has any knowledge or information sufficient to form a belief as to whether prior to said collision the Steamer "King" was staunch, strong or seaworthy, and as to whether she had a full complement of officers or crew, and with respect to the remaining allegations contained in Article numbered "III" of said petition, alleges upon information and belief, that they are false and un-

true and are therefore denied, and says that the true facts are as hereinafter set forth.

Fourth. Upon information and belief, denies each and every allegation contained in Article numbered "IV" of said petition.

Fifth. Upon information and belief, denies each and every allegation contained in Article numbered "V" of said petition.

Sixth. Admits the allegations contained in Article numbered "VI" of said petition.

Seventh. Admits the jurisdiction of this Honorable Court, and upon information and belief, denies that all or singular the premises of said petition are true.

Further answering the allegations of said petition, alleges upon information and belief:

[fol. 42] Eighth. That about 5:30 P. M. in the afternoon of August 11th, 1933, as the Steamer "George D. Dixon," being then stout, staunch and in all respects seaworthy, and manned with a full complement of officers and crew properly stationed and attentive to their duties, and laden with a cargo of sugar, rubber and general merchandise, was proceeding up the St. Clair River and about to come abreast the City of Port Huron, the weather became thick from heavy rain and fog, and the Steamer "Dixon" at once reduced her speed to moderate speed and commenced the blowing of fog whistles; that the fog whistle of a steamer which proved to be the Steamer "Willis L. King" was then heard from up the river, and the "Dixon" responded with a fog signal and proceeded with caution under bare steerageway; thereupon, a one blast passing signal was heard from the "King," to which the "Dixon" responded with a one blast passing signal and directed her course to starboard in accordance therewith, and again blew her fog signal, continuing with caution and under bare steerageway, and while so directing her course to starboard there were two further exchanges of one blast passing signals between the Steamer "King" and the Steamer "Dixon," and the "Dixon" was proceeding slowly to starboard so that she was headed onto the Canadian shore and was well on the Canadian side of the river, when suddenly the Steamer "King" showed up close off the port side of the Steamer

"Dixon," coming at a high and unlawful rate of speed, and as she showed up the Steamer "King" blew a danger signal and a two blast passing signal, but she was so close upon the Steamer "Dixon" and coming at such a rate of speed that the "Dixon" was helpless to prevent the collision, and there was no time or opportunity for her to do other than to continue on her course toward the Canadian bank, and she blew a one blast signal indicating that course; that the Steamer "King," coming at a high and unlawful speed, struck stem on the port side of the Steamer "Dixon" about amidships, and that the Steamer "King" struck the "Dixon" with such force that her stem cut into and damaged plating on the port side of the "Dixon," damaged frames, buckled her decks, damaged her refrigerator house, and disabled the shaft of her steering gear.

That the said collision occurred abreast of the City of Port Huron but close to the Canadian shore, and the "Dixon" brought up on said shore bow on, and let go [fol. 43] anchor and drifted downstream some distance and fetched up with her starboard side along the bank of the Canadian shore.

Ninth. Upon information and belief, that said collision occurred in waters with respect to which the Secretary of War by regulation duly adopted has provided that except as to vessels under 100 gross tons and vessels making local stops, downbound vessels are required to navigate in the American channel and upbound vessels in the Canadian channel.

Tenth. That said collision occurred without any fault or want of care on the part of the Steamer "Dixon," or those engaged in her navigation, and reserving the right to urge such other and further faults as may appear upon a full hearing of this cause, that said collision was solely the result of faults and negligence of those engaged in navigating the Steamer "Willis L. King" in the following particulars:

1. In that her master and crew were careless and inattentive to their duties.

2. In that she maintained no proper lookout.

3. In that she failed to navigate at a moderate speed on encountering thick weather.

4. In that she failed to reduce her speed to bare steerageway, and failed to navigate with caution on hearing the Steamer "Dixon."

5. In that she failed to direct her course to starboard, in accordance with passing signals exchanged between the "King" and the "Dixon."

6. In that she came into waters rightfully belonging to the Steamer "Dixon" for her navigation.

7. In that she left the waters which she was bound to keep in as a downbound vessel, and came into the waters reserved for upbound vessels, in violation of regulation pertaining to said waters.

8. In that she violated Rules 15, 17, 23, 26, 27 and 28 of the Act of Congress known as the White Law.

9. In that she was navigated at and struck the Steamer "Dixon" while going at a negligent and unlawful rate of speed.

10. In that her navigation was entirely without caution, and in gross disregard of the rules of navigation and pru-
[fols. 44-54] dent seamanship and the rights of others.

Wherefore, said Great Lakes Transit Corporation prays that the said petition of Interstate Steamship Company be dismissed with costs, and for such other and further relief as to law and justice may appertain.

Great Lakes Transit Corporation, by W. R. Evans, Comptroller. Brown, Ely & Richards, 1317 Chamber of Commerce, Buffalo, New York, and Stanley & Gidley, Marine Trust Building, Buffalo, New York, Proctors for Great Lakes Transit Corporation.

Duly sworn to by W. R. Evans. Jurat omitted in printing.

[fol. 55] IN UNITED STATES DISTRICT COURT

TRIAL TO COURT ON PLEADINGS AND EVIDENCE; ORDER OF CONSOLIDATION OF CASE NO. 3168 WITH 3170; ALL OF TESTIMONY ADDUCED ON BEHALF OF LIBELLANT AND PART OF TESTIMONY ON BEHALF OF RESPONDENT; ADJOURNMENT

(Entered February 15, 1934, by S. H. West, Judge)

Case No. 3168

This day came the parties by their proctors, and this cause came on for final hearing on the pleadings and the evidence. And the Court having heard the opening statement of counsel, thereupon, pursuant to oral stipulation of the parties, this case was ordered consolidated with case No. 3170 Admiralty. And the Court having heard all of the testimony adduced in chief on behalf of the libellant, and a part of the testimony in chief adduced on behalf of the respondent, and the hour for adjournment having arrived, the further trial of this cause was postponed until tomorrow morning at 9:30 o'clock.

IN UNITED STATES DISTRICT COURT

TRIAL TO COURT IN PROGRESS; ALL TESTIMONY ADDUCED ON BEHALF OF PARTIES CONCLUDED; ARGUMENT HAD; CAUSES TAKEN UNDER ADVISEMENT

(Entered February 16, 1934 by S. H. West, Judge)

Case No. 3168

This day again came the parties by their proctors, and these causes came on for final hearing on the pleadings and the evidence. And the Court having heard all of the testimony adduced on behalf of the parties, and the argument of counsel, took the causes under advisement. Briefs to be filed on or before March 5, 1934.

[fols. 56-241] IN UNITED STATES DISTRICT COURT

TRIAL TO COURT OF PLEADINGS AND EVIDENCE; ORDER OF CONSOLIDATION OF CASE NO. 3170 WITH 3168; HEARING PASSED ON INTERVENING PETITION OF MILKO; TESTIMONY IN CHIEF ADDUCED ON BEHALF OF INTERSTATE STEAMSHIP COMPANY; PART OF TESTIMONY ADDUCED ON BEHALF OF GREAT LAKES TRANSIT CORPORATION; ADJOURNMENT

(Entered February 15, 1934 by S. H. West, Judge)

Case No. 3170

This day came the parties by their proctors, and this cause came on for final hearing on the pleadings and the evidence. And the Court having heard the opening statement of counsel, thereupon, pursuant to oral stipulation, this case was ordered consolidated with case No. 3168 Admiralty. Thereupon, pursuant to oral stipulation, the hearing on the intervening petition of John Milko was passed, pending decision on the merits of libels and answers. And the Court having heard all of the testimony in chief adduced on behalf of Interstate Steamship Company, and a part of the testimony in chief adduced on behalf of Great Lakes Transit Corporation, and the hour for adjournment having arrived, the further trial of this cause was postponed until tomorrow morning at 9:30 o'clock.

IN UNITED STATES DISTRICT COURT

TRIAL TO COURT IN PROGRESS; ALL TESTIMONY ADDUCED ON BEHALF OF PARTIES CONCLUDED; ARGUMENT HAD; CAUSES TAKEN UNDER ADVISEMENT

(Entered February 16, 1934 by S. H. West, Judge)

Case No. 3170

This day again came the parties by their proctors, and these causes came on for final hearing on the pleadings and the evidence. And the Court having heard all of the testimony adduced on behalf of the parties, and the argument of counsel, took the causes under advisement. Briefs to be filed on or before March 5, 1934.

[fol. 242] IN UNITED STATES DISTRICT COURT

MEMORANDUM OPINION AND DECISION OF THE COURT IN CASES NOS. 3168 AND 3170—Filed March 29, 1934

WEST, J.:

Libel of Interstate Steamship Company, owner of the Steamer Willis L. King against Great Lakes Transit Corporation, owner of the Steamer George D. Dixon, for damages resulting from collision. Respondent answered denying fault and annexed interrogatories which were answered by libellant. Respondent also filed libel against the owner of the King for damages to the Dixon and her cargo. Milko, seaman on the Dixon, has intervened, claiming damages from the King for personal injuries sustained in the collision. The original libellant answered the libel of the Transit Corporation and the intervening libel of Milko; and also filed petitions under Admiralty Rule 56, claiming that the Transit Corporation was liable for any damage to Milko and the cargo of the Dixon. After the issues were made up the suits were consolidated. Under stipulation the trial concerned only questions of fault.

The King is 580 feet long, 58 feet beam and 32 feet deep, while the length of the Dixon is 350 feet, her beam 46 feet and depth 30 feet. On August 11, 1933, the King was bound down the lakes with a cargo of ore and the Dixon was proceeding from Buffalo to Chicago with a miscellaneous cargo of merchandise. The collision occurred about 5:40 p. m. on the Canadian side of St. Clair river at Port Huron-Sarnia just at the conclusion of a sudden and severe storm of wind and rain which had greatly obscured the view on the river.

The King was required to and did blow a single blast bend signal as she came down and approached the so-called Traffic Buoy located in the channel somewhat on the American side just above the mouth of Black River. No claim is made that this signal enters into the case and it needs no further mention. The ship passed between the American shore and this buoy and about 100 feet from the latter at full speed of not less than ten miles per hour, and her proctors admit in their brief that if this speed, which was in excess of the nine-mile limit (Bull. 42 p. 312), was a contributing cause of the

collision, the King cannot escape liability. As the un- [fol. 243] contradicted testimony is that she very soon checked to half speed, which would be reached in proceeding about half a mile, a considerable distance short of the point of collision, I can not find, even considering the effect of the current, that her speed immediately before the collision exceeded the nine mile limit. Capt. Watts of the King says when she passed the buoy the weather was clear with a fresh westerly wind, but that when he got a little below Black River a sudden rain squall set in which interfered with vision beyond 900 or 1000 feet, visibility decreasing down the river. He then heard a three-blast fog signal from that direction and immediately checked to half speed. He says he at once blew a passing whistle of two blasts indicating that he was directing his course to port. He testified that he heard no answer, nor any further fog signal, nor did he see the upbound ship; that after 30 or 40 seconds he repeated his two-blast passing signal, still receiving no response, and then the Dixon appeared about a point and a half on his starboard bow "in a perfect parallel line with the course we were going." The weather was then clearing. Capt. Watts testifies that he then blew a third two-blast signal, whereupon the Dixon, then some 1500 feet away, left her course and headed across the King's bow; that the King backed full speed, blew a danger signal and then another two-blast passing signal, but the Dixon, according to the witness, kept right on until she crossed the bow of the King, which struck her at an angle of 90 degrees near amidships. He says that when the Dixon came into view the King was over on the Canadian side, about 500 feet from shore, heading on a point on that shore a mile or a mile and a half down stream. This witness fixes the collision at 5:36 and locates the point about 900 or 1000 feet below the Port Huron Coal Dock shown by his mark on a chart, Lib. Ex. 1, to be across the international boundary line.

He says that just below Black River he ordered his wheelsman to head on the Mueller plant right across the river from the Port Huron Coal Dock, and proceeded until he came opposite the elevator also marked on the chart, when the storm shut out the view of the Mueller plant, the King then having reached midstream.

The first mate says the King blew three two-blast passing signals before the collision. When he saw the Dixon

she was off on the starboard not quite parallel to the King, towards which she looked to be swinging. The mate heard [fol. 244] no fog signal from either vessel, nor any sort of signal from the Dixon prior to the collision, and estimates the distance between vessels when the fog lifted, at a quarter mile.

The wheelsman of the King heard a fog signal from a vessel down the river and says Capt. Watts blew a similar signal in answer and followed it with a two-blast passing whistle, and that when this was blown the ship was heading on the Mueller plant across the river. He says the King blew three two-blast passing signals and then a danger signal, but he heard nothing from the Dixon save the first fog whistle. He saw the Dixon on a parallel course about 1200 feet away just before the danger signal and says "the Dixon didn't port her helm but was going towards starboard."

The watchman heard and reported the fog signal from down stream, heard the King answer it with three blasts, and then sound at least two two-blast signals and a danger signal. Aside from the first fog whistle he heard no signals from the Dixon.

The assistant engineer was called to testify that the King checked speed at 5:32, went full speed astern at 5:34, and struck the Dixon at 5:36, according to the slate in the engine room. The engineer was also called, but only as to matters relating to his engines. No other witness testified that the King blew two-blast passing signals, except Dr. Francois, an outside witness who saw the Dixon pass up the river, heard her blow a one-blast whistle just before she entered the storm, and from out of the storm heard a fog signal, a two-blast and another fog signal before "a conglomeration of danger signals."

On the question of whistle signals, the testimony from the crew of the Dixon is that she blew a fog signal of three blasts at a point in the river about one-half mile below Reed's dry dock, marked "R" on the chart, Respondent's Ex. A; also shown on Libellant's Ex. 1 as the Lagoon. Here a similar signal was heard from the King. A second fog signal by the Dixon was followed, according to these men, by a one-blast passing signal from the King indicating a port to port passing requested. This was answered

by one blast from the Dixon, indicating acceptance. Thereafter the Dixon directed her course to starboard on the Canadian side, and the two vessels then exchanged fog signals and at least two more one-blast passing signals. Capt. Goodberry testifies he then heard an alarm of five [fol. 245] short whistles from the King, looked out and saw her light on his port side, and then for the first time received a passing signal of two blasts; that "there was no possible chance of me giving him what he asked for, so I blew one whistle and hollered hard aport." Libellant admits the Dixon blew at least one single blast passing signal, as testified to by its own witness, Dr. Francois. Brewer, an outsider, testifies to the same fact. Geel, Snyder, and Capt. Conlin testify to several one-blast signals given by the Dixon. As one such signal is admitted, and the overwhelming weight of evidence establishes others, it must be found that at least three one-blast passing signals were sounded by the Dixon before the alarm. Capt. Watts and his men admit hearing the original fog whistle of the Dixon; but deny hearing any later fog signals or any of the one-blast passing signals. No explanation for their failure to hear is advanced, and none appears.

If they heard only the fog signal, the King was at fault in proceeding as she did at a speed of at least seven miles an hour in violation of Rule 15 requiring a moderate speed, and in not reducing to steerageway. I cannot accept the claim of these men that no other signals from the Dixon were heard. While one single passing blast might have been missed, it is incredible that none of the three were noticed.

Witnesses from the Dixon who testify that the King blew several one-blast signals instead of the two-blasts testified to by the King's crew, are corroborated by Brewer, the keeper of the Spokane, which lay near the Lagoon, and Capt. Conlin, who was employed at a shipyard along the river. Both these men are disinterested, and the latter a mariner. When the storm came up, the men at the shipyard were permitted to leave before their regular time, 5:30, and Conlin was driven up town by two employes, the Sasse brothers. Conlin testifies that driving north on Military Street the machine was stopped at Griswold for traffic and a hard rain, and he then heard a chime whistle from the river blow one blast and a minute or so later after they

had started on, he heard another. The King carried a chime whistle. Both these signals were answered by a coarse steamboat whistle. Conlin left the car at Military and Water Streets and says he stood under an awning out of the rain, waiting to go to a barber shop; and while there heard the chime whistle sound an alarm. Returning to the shipyard that evening he heard of the collision and ob- [fol. 246] served the Dixon over on the Canadian shore at anchor. This was on Friday. On Monday, before being interviewed by any of the parties, Conlin was seen by the local steamboat inspector, who requested him to come to the office and make a statement at 2:00 o'clock, which he did. Proctors for the King say this testimony is discredited by the Sasse brothers' evidence that they carried Conlin up town much earlier than he gives it; that as they crossed a certain bridge the 5:00 o'clock whistles blew; that there was no storm or rain before Conlin left the car and that the rain really began just as they reached their respective homes, a considerable distance from where they left Conlin; and where each was greeted by his wife with the exclamation that he was home early, and that it was only 5:25. I was not much impressed by these two witnesses or their testimony. Conlin had every appearance of a responsible and truthful person. From his calling it would be quite likely that the steamer signals and alarms given in the storm would make a strong impression on his mind. Further, his story as to when the rain started was to some extent corroborated by Sturtevant, another employee of the shipyard.

Brewer claimed he heard the King blow a single blast signal, although he first omitted to say so. No one heard any two-blast signals from the King except one which she blew just before the collision. Dr. Francois testified to hearing one before the alarm, but I am inclined to think it the one shown by men on the Dixon to have been given after the alarm. The record of the hearing before the inspectors had Lemke, the Dixon lookout, saying he heard the King blowing two-blast signals. He challenged this, and other portions of the record show he is right and that the inspectors understood his answers to refer to one-blast whistles. This record is not accurate in all respects. It partially represents the deductions of the inspectors from

what witnesses said, rather than the language of the witnesses.

Libellant argues that to hold that the King blew one blast signals while navigating as though they were two-blasts, convicts her captain of sheer stupidity, citing The North Star, 62 Fed. at p. 80, where such evidence was not regarded as credible. In that case there was no corroboration from outside disinterested witnesses. The same argument applies to the Dixon. If she went to starboard on two-blast signals from the King and answered with one-blasts, then [fol. 247] her captain was either stupid or exceedingly careless. The undoubted fact is that one or the other of these masters was careless in respect of the signals he gave, and the weight of evidence and probabilities point to Capt. Watts as the one. Port to port passing is the usual thing at this point, and there are indications that the King intended to keep to the right. Her course was once or twice changed in that direction soon after passing Black River. The current tends across to Canada, to such extent that Bull. 42, p. 312, warns masters of the fact. The customary practice seems to have made it permissible to navigate well out in midstream. The storm was violent and visibility bad. I am not impressed by Capt. Watts' statement that he purposely went to the Canadian side in order to bring his ship about and anchor on the American side. The storm hardly warranted that. He was inattentive, as proven by his failure to hear all the Dixon's signals save the first fog whistle, and it is quite likely that he got across the line and in the regular path of upbound traffic before he realized it. I give no weight to the marking of the up and down bound channels on the charts, for Rule 24 gave the King the right of way, and she could elect either side, though it stands to reason she would not take the unusual course without some cause. It is clear enough that careless navigation of the King was a direct cause of the collision. When he found himself on the Canadian side, if not before, Capt. Watts should have observed Rules 15 and 26 (33 U. S. C. 272 and 291) by sounding an alarm, reducing speed, and navigating with caution. The New York, 175 U. S. 187; The Perseus, 272 Fed. 633 (C. C. A. 6) The Martin Mullen, 200 Fed. 916 (C. C. A. 6); Pittsburgh S. S. Co. v. Duluth S. S. Co., 222 Fed. 834 (C. C. A. 6).

The more difficult questions concern the alleged faults of

the Dixon; and of those claimed only excessive speed, crossing the bow of the King from a position of safety in the face of two-blast and alarm signals, and failure to stop or reverse, or use any means to avoid collision, are important on the evidence.

The proof does not show that excessive speed of the Dixon contributed to the accident. If we discard the testimony of her captain and crew that the vessel was checked to slow speed half a mile below the lagoon and accept that of Dr. Francois, who says that as she passed the lagoon she was going at full speed, still I have no doubt and will find [fol. 248] that the vessel later checked in time to reduce her speed to a very moderate one. She was going against the current, the mean average speed of which was about two miles an hour. Captain Goodberry testifies that at the time of the collision she was barely moving, and the wheelsman put her speed at about steerageway.

On this point I regard it very significant that none of the men from the King who witnessed the collision testified about the speed of the Dixon. They told of her position when she came into view and that she crossed the course of their vessel, but said not a word as to how fast she moved.

In this connection, much is made in the brief for the King of the state of the Dixon's logs. I can see no ground for believing that there has been any substitution, fraudulent entries, or false erasures. The explanation of the Dixon's witnesses satisfies me about that. One log shows the check to have occurred at 5:25 and the other at 5:30, but evidently this is a mere mistake without design. Mention is made of what is said to be a difference in the number of revolutions shown by Ex. 6 and the number testified to before the inspectors. The witness who made up Ex. 6 aptly asked what more he could do than turn his log over to the inspectors. It is also claimed that the Dixon's engineer testified before the inspectors that her engine was checked down immediately before the collision. His testimony is clear enough that what he intended to say was that the check occurred at the beginning of the storm. These matters can only bear on the Dixon's speed, and I am satisfied that just before the collision it was not excessive.

The vessels came together at about right angles, the bow of the King striking the Dixon 143 feet back from the stem on her port side. A minor claim is that the Dixon had to

begin porting on the American side in order to get into this position; but there is no evidence whatever that she was on the American side at any time.

When the vessels came into each other's view they were, according to the more satisfactory evidence, 400 or 500 feet apart. The captain of the King testified that he thereupon blew another two-blast passing signal when the Dixon immediately ported her helm and headed across his bow, and that he then blew a danger signal. This is incorrect so far as concerns the beginning of the Dixon's change of course; it started much earlier and while the vessels were still hidden from each other in the murk.

The final question is whether the Dixon was at fault in changing her course and failing to sound an alarm before [fol. 249] she heard the alarm of the King and before that vessel came into view.

The testimony from the Dixon is that on hearing the fog signal of the King, her lookout reported a ship ahead, which the mate thought was a little on the starboard bow. When the King's first passing signal of one blast was received, the lookout reported it a trifle on the starboard bow, and Capt. Goodberry ordered the helm ported one half point. The lookout then heard the King's second passing signal and reported a ship one half point off the starboard bow, whereupon the captain ordered a further change of the helm of an additional point to port.

After the receipt of the third one-blast signal, Capt. Goodberry testifies he told his wheelsman to port again and keep her coming. He then heard the King's alarm, saw her flash on his port side and heard a two-blast signal and the King came into full view. Seeing no chance of making the starboard passing as requested, he blew one whistle and shouted "Hard aport."

I do not find the Dixon at fault for porting one half point after the first passing signal. Nor for refusing the King's offer of a starboard passing, blowing one blast, and continuing on her course to starboard. The porting one half point cannot be held to be negligence, and the other acts, if negligent, were done in extremis.

However it must be found that before these acts in extremis occurred and after the Dixon had ported one half point, because of the steamer ahead, the second passing signal of the King and the report of the lookout notified Capt.

Goodberry that the approaching steamer was still about half a point off to starboard, whereupon he ordered the Dixon ported another point; and that after the third exchange of one-blast signals but before the King's alarm and when it was apparent that the other vessel was close and still approaching the course of the Dixon, Capt. Goodberry gave his wheelsman an order to port again and keep her coming.

During all this time the Dixon was over on the Canadian side, as her captain well knew. He found the King also there instead of on the American side where she ought to have been under the passing agreement, and closer to the Canadian shore than the Dixon, in fact only about 400 feet off.

Under these circumstances, and when after the Dixon's first change of course to starboard, it was discovered that the King continued on in her direction, Capt. Goodberry [fol. 250] should have appreciated that the approaching vessel was being very badly navigated or was laboring under some serious misunderstanding and that there was risk of collision unless the Dixon took prompt steps to prevent it. He should then have sounded alarms and stopped her headway. See Rule 26. Had this been done the King undoubtedly would have slowed down sooner than she did and the collision would have been averted. There is no evidence that this would have endangered the Dixon through loss of ability to control her.

Instead the Dixon, having already ported one half point, again ported her helm another point after receiving the second passing signal; and after the third was received and before she definitely located the position and course of the King, ported still more and came across the King's bows. Counsel for the Dixon say it was her duty to keep to starboard under her passing agreement, with which she had the right to assume the King would comply. But when it became apparent that the King was not complying, the duty arose to meet the new situation by the exercise of such precautions as prudent navigation required. The Dixon changed her course without knowing where the King would be found, instead of adopting the simple precautions against collisions in thick weather, provided by the rules, and for this she must be found negligent. The North Star, 62 Fed. 71 (C. C. A. 6); The Roby, 111 Fed. 601; The Quogue, 47 F. (2d) 873.

The change of the Dixon's course prior to the King's coming into view might not have brought her across the path of the downbound vessel just where the collision occurred, but the probabilities are that the result would have been the same without the subsequent order "hard aport" given after the third passing signal. For following the order to port one point, the next was to port and keep her coming and, according to the wheelsman, to whom these orders were given, their combined effect was equivalent to a direction to "hard aport."

The Dixon and her owners may not escape responsibility under the rule requiring evidence of her fault to be clear and convincing, assuming such rule to apply. All evidence on that point against her comes from her master and crew, and the court has made no "over-scrupulous search for possible faults" with which to charge her. [fol. 251] Steffens v. U. S., 32 F. (2d) 206. The negligence here was of the character found in Lie v. San Francisco & Portland S. S. Co., 243 U. S. 291, and both vessels will be found at fault and the damages divided accordingly, costs to be borne equally by Interstate Steamship Company and Great Lakes Transit Corporation.

The parties have agreed to a reference for the assessment of damages, and J. M. Shallenberger, Esq., of Cleveland, will be appointed special master commissioner to determine and report to the court the amount of damages sustained, including damages of the owner of the Dixon as bailee of her cargo, and damages due to personal injuries suffered by John Milko, intervenor.

S. H. West, Judge.

March 28, 1934.

IN UNITED STATES DISTRICT COURT

PETITION OF GREAT LAKES TRANSIT CORPORATION FOR REARGUMENT, IN CASE NO. 3168—Filed April 21, 1934

To the Honorable Samuel H. West, United States District Judge for the Northern District of Ohio.

The petition of the Great Lakes Transit Corporation respectfully shows:

That the issues presented by the pleadings in the above-entitled causes came on for trial before the Honorable

Samuel H. West on the 15th day of February, 1934; that on the 28th day of March, 1934 a decision in writing was duly made; that the principal issues of fact presented by the pleadings were with respect to the signals blown by the [fol. 252] respective vessels and the speed at which they were moving before and at the time of the collision; that all said issues of fact were resolved in favor of petitioner but nevertheless petitioner's Steamer Dixon was held guilty of contributory fault for the collision which was the subject of the controversy, in that the Court held she should have stopped her headway and blown an alarm signal after receiving the second one-blast whistle signal of the Steamer King, to which signal the Dixon replied and in conformance to which said signal the Steamer Dixon put her helm to port; that petitioner is submitting herewith a memorandum wherein are set forth fully its reasons why a reargument should be granted; that the ends of justice would be served if petitioner be granted a reargument in which there can be a full presentation of the law applicable to the facts as found by this Honorable Court.

Wherefore, petitioner prays that an order be entered in this cause directing that reargument be had at such time as the Court may direct.

Great Lakes Transit Corporation, Brown, Ely & Richards, by Brown, Ely & Richards, Its Counsel, Office & P. O. Address, 1317 Chamber of Commerce Bldg., Buffalo, N. Y.

May 7th, 1934.

After a fairly careful consideration of the briefs I find nothing in that of respondent inducing me to change my conclusion. On the authorities cited in the opinion, including The Quogue, 47 F. (2d) 873, which was cited to show the general duty of careful navigation "independently of what the pilot rules may require," I do not see how the decision could have been otherwise than it was, and the petition for reargument is denied. Exceptions to respondent.

S. H. West, Judge.

[fol. 253] IN UNITED STATES DISTRICT COURT

ORDER DENYING PETITION FOR REARGUMENT

(Entered May 7, 1934 by S. H. West, Judge)

Case No. 3168

This day this cause came on to be heard on the petition of the respondent, Great Lakes Transit Corporation, for reargument, and was submitted to the Court; on consideration thereof the Court denied said petition, to which ruling of the Court the respondent, Great Lakes Transit Corporation, by its proctors, excepts.

IN UNITED STATES DISTRICT COURT

PETITION OF ATLANTIC MUTUAL INSURANCE COMPANY, INTERVENING FOR ITS INTEREST AS INSURER AND UNDERWRITER OF THE CARGO OF THE STEAMER "GEORGE D. DIXON," IN CASES NOS. 3168 AND 3170—Filed April 25, 1934

To the Honorable the Judges of the United States District Court for the Northern District of Ohio, Eastern Division:

The petition of Atlantic Mutual Insurance Company, a corporation, intervening in the above entitled consolidated cause for its interest, as insurer and underwriter of the cargo of the Steamer George D. Dixon, against the Steamer Willis L. King, her engines, etc., and against Interstate Steamship Company, respondent herein, and against all persons intervening for their interests in the above entitled cause, respectfully alleges and shows to the Court upon information and belief, as follows:

First. That at all the times herein stated your petitioner was, and still is, a corporation duly organized and existing under and by virtue of the laws of the State of New York, and as such was, and is, duly authorized to engage in and [fol. 254] is lawfully engaged in the business of marine insurance.

Second. That on or about the 11th day of August, 1933, the Steamer George D. Dixon, being laden with a cargo of miscellaneous goods and merchandise belonging to divers owners, shippers and consignees, was engaged upon a voyage from Buffalo to Milwaukee and Chicago and other inter-

mediate ports upon the Great Lakes, and that while engaged upon said voyage said Steamer was struck by and collided with the Steamer Willis L. King in the St. Clair River upon said day, by reason of which collision said Steamer George D. Dixon was severely damaged, the further prosecution of her voyage was frustrated and much of the cargo laden thereon was damaged, wet and lost.

Third. That said cargo was shipped on board said vessel pursuant to contract between the owners, shippers and consignees of said cargo and Great Lakes Transit Corporation for the carriage thereof, wherein and whereby said Great Lakes Transit Corporation agreed to provide insurance upon said cargo against the perils of the seas, and lakes, including collision.

Fourth. That heretofore and on or about the 23rd day of May, 1933, your petitioner by its policy of insurance duly issued, insuring Great Lakes Transit Corporation for the account of whom it may concern to the extent of thirty per cent of total insurance in the amount of $1,100,000.00 on cargo under and/or on deck on board the Steamer George D. Dixon on any voyage between ports upon the Great Lakes between April 15th, 1933, and December 12th, 1933, insured the owners, shippers and consignees of said cargo on board said Steamer George D. Dixon as aforesaid upon said cargo to the extent of thirty per cent of the value thereof against the perils of the seas and lakes, including collision, and against any and all claims which said cargo should be called upon to contribute in general average; that a copy of said policy, marked Schedule "A,"* is hereunto annexed and by reference made a part hereof.

That similar insurance, which, with that above referred to, amounted to $1,100,000.00 and insured the full and reasonable value of said cargo was carried with and provided by other insurers.

[fol. 255] Fifth. That on or about the 25th day of January, 1934, said Great Lakes Transit Corporation, as owner of the said Steamer George D. Dixon and as carrier and/or

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* Schedule A referred to herein has been transferred and attached to Stipulation dated June 13, 1934 and appears at page 268.

bailee of cargo lately laden thereon, filed its libel in this Court, against the Steamer Willis L. King, her engines, etc., and against Interstate Steamship Company, the owner and operator thereof, to recover the damages resulting to said Steamer George D. Dixon and to cargo laden thereon by reason of said collision; that in said libel it is alleged that said collision was due solely to the fault of the Steamer Willis L. King, those in charge of her, and of Interstate Steamship Company, in the following particulars:

1. In that her master and crew were careless and inattentive to their duties.

2. In that she maintained no proper lookout.

3. In that she failed to navigate at a moderate speed on encountering thick weather.

4. In that she failed to reduce her speed to bare steerageway, and failed to navigate with caution on hearing the Steamer Dixon.

5. In that she failed to direct her course to starboard, in accordance with passing signals exchanged between the King and the Dixon.

6. In that she came into waters rightfully belonging to the Steamer Dixon for her navigation.

7. In that she left the waters which she was bound to keep in as a downbound vessel, and came into the waters reserved for upbound vessels, in violation of regulation pertaining to said waters.

8. In that she violated Rules 15, 17, 23, 26, 27 and 28 of the Act of Congress known as the White Law.

9. In that she was navigated at and struck the Steamer Dixon while going at a negligent and unlawful rate of speed.

10. In that her navigation was entirely without caution, and in gross disregard of the rules of navigation and prudent seamanship and the rights of others, and it is therein prayed that said Great Lakes Transit Corporation recover the sum of $120,000.00 with interest against the said Steamer Willis L. King and Interstate Steamship Company, all of which more fully appears from said libel now on file in this Court to which your petitioner begs leave to refer.

[fol. 256] Sixth. That the amount of damage and loss by reason of the aforesaid collision to all of said cargo has not been definitely determined, but your petitioner is informed and believes that the same will amount to the sum of approximately $30,000.00; that such damage to part of said cargo amounts to the sum of $21,338.58, and that $6401.57, being thirty per cent thereof, has been paid by your petitioner to said Great Lakes Transit Corporation for account of the owners, shippers and consignees of said cargo, whereby your petitioner has become subrogated to the rights of said owners, shippers and consignees; that upon the determination of the amount of damage to the balance of said cargo your petitioner will likewise pay thirty per cent thereof and will likewise become subrogated to the rights of the owners, shippers and consignees of said cargo.

Seventh. That in addition to the payments aforesaid your petitioner has incurred and will incur other expenses and charges in respect to general average, the amount of which is not yet determined.

Eighth. That by reason of the premises your petitioner has become subrogated to and has succeeded to and acquired the rights of all the assured as hereinbefore mentioned against the Steamer Willis L. King and Interstate Steamship Company on account of the collision aforesaid.

Ninth. That the aforesaid collision between the said Steamers George D. Dixon and Willis L. King was caused by the fault and negligence of the Steamer Willis L. King and of those in charge of her, and of said Interstate Steamship Company in the respects alleged in the libel heretofore filed herein and referred to in Article Fifth of this petition.

Tenth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, your petitioner prays that it may be permitted to intervene herein and to prosecute for its own benefit the claims, demands and causes of action, of itself, of the owners, shippers and consignees of said cargo laden on board said Steamer George D. Dixon and of Great Lakes Transit Corporation, as bailee of said cargo, arising by reason of the damage to said cargo in the collision aforesaid, and that [fol. 257] claimant and respondent Interstate Steamship

Company, and libelant, Great Lakes Transit Corporation, may be required to answer this petition, and that this Court will be pleased to decree to your petitioner and against Interstate Steamship Company and the Steamer Willis L. King, her engines, etc., and her sureties, the sum of $6401.57 with interest thereon, and also such further sums as your petitioner will be required to pay as set forth in Articles Sixth and Seventh hereof, the amount of which is not yet determined, and all proper charges which may be assessed upon said cargo, with interest thereon and the costs of this action, and that said Steamer Willis L. King may be condemned and sold to pay the same, and that your petitioner may have such other and further relief in the premises as it may be entitled in law and in justice to receive.

Atlantic Mutual Insurance Company, by Ellis H. Gidley, One of its Proctors. Stanley & Gidley, Proctors for Petitioner, Office and P. O. Address, 627 Marine Trust Building, Buffalo, New York. Russell V. Bleecker, Terminal Bldg., Cleveland, O.

Duly sworn to by Ellis H. Gidley. Jurat omitted in printing.

[fol. 258] IN UNITED STATES DISTRICT COURT

STIPULATION WITH RESPECT TO AND FOR THE BENEFIT OF INSURANCE COMPANIES OTHER THAN ATLANTIC MUTUAL INSURANCE COMPANY, THAT THE INTERVENING PETITION OF ATLANTIC MUTUAL INSURANCE COMPANY WOULD STAND AS AND FOR THE INTERVENING PETITION OF EACH OF SAID INSURANCE COMPANIES, IN CASES NOS. 3168 AND 3170—Filed June 9, 1934

Whereas, Atlantic Mutual Insurance Company, representing itself as an insurer of the cargo lately laden on the Steamer George D. Dixon, to the extent of 30% of the total insurance issued thereon, has heretofore filed an intervening petition in the above entitled cause for account of its interest therein as in said libel it is more fully stated and

Whereas, for the underwriters named in this paragraph it is asserted that the remaining 70% of the total insurance covering the cargo lately laden on board the Steamer George D. Dixon, was issued by said various underwriters named [fol. 259] in this paragraph under the same policy condi-

tions as referred to in said intervening petition, in the following percentages of the total insurance effected:

Home Insurance Co.	10 per cent.
Union Marine & General Ins. Co. (U. S.)	10 per cent.
Sun Insurance Office (U. S.)	8 per cent.
Eagle Star & British Dominions (U. S.)	5 per cent.
Fireman's Fund Ins. Co.	4 per cent.
Great American Ins. Co.	3 per cent.
Lloyd's, London	11.435 per cent.
Edinburgh Assurance Co.	2.995 per cent.
British Traders Ins. Co.	2,995 per cent.
Royal Exchange Assurance	2,995 per cent.
Cornhill Ins. Co.	2.995 per cent.
Sun Insurance Office	2.995 per cent.
Economic Insurance Co.	1.795 per cent.
London Assurance	1.795 per cent.

and

Whereas, it is further asserted that said named underwriters have heretofore paid, or are about to pay, on account of loss, damage and injury sustained by the cargo of the steamer George D. Dixon, the following named sums, according to the respective percentages hereinbefore set forth:

Home Insurance Co.	$2,133.85
Union Marine & General Ins. Co. (U. S.)	2,133.86
Sun Insurance Office (U. S.)	1,707.60
Eagle Star & British Dominions (U. S.)	1,066.93
Fireman's Fund Ins. Co.	853.54
Great American Ins. Co.	640.16
Lloyd's, London	2,440.06
Edinburgh Assurance Co.	639.09
British Trader's Ins. Co.	639.09
Royal Exchange Assurance	639.09
Cornhill Ins. Co.	639.09
Sun Insurance Office	639.09
Economic Ins. Co.	383.03
London Assurance	383.03

and

Whereas, it is asserted that upon the determination of the amount of damage to the balance of said cargo, said

underwriters will likewise pay the same according to said percentages, and

[fol. 260] Whereas, it is asserted that said named underwriters, similar to said Atlantic Mutual Insurance Company, have incurred and will incur other expenses and charges in respect to general average, the amount being as yet undetermined, which said expense said underwriters will be required to pay in accordance with said percentages:

It Is Hereby Stipulated, by and between the proctors for the respective parties in the above entitled action, and proctors for said underwriters claiming to have insured 70% of the total insurance covering cargo laden on board the Steamer George D. Dixon, that the intervening petition of Atlantic Mutual Insurance Company heretofore filed herein shall stand for all purposes herein as and for the intervening petition of each of said named underwriters according to the respective percentages of insurance claimed to have been underwritten by each of them, as aforesaid; and it is hereby further

Stipulated, that the claim of each of said named underwriters for recovery herein is in form similar to the claim of said Atlantic Mutual Insurance Company as set up in its intervening petition, and arises out of the total amount of insurance referred to in the intervening petition of Atlantic Mutual Insurance Company to the extent of the respective percentages of said insurance underwritten by each of said named underwriters as the same shall be established; and it is hereby further

Stipulated, that any pleading interposed by any party hereto to the said petition of intervention of Atlantic Mutual Insurance Company shall stand and serve as a like pleading by each party as against the claim of intervention of each respective herein named underwriter similarly situated; and it is hereby further

Stipulated, that in the event of a recovery being decreed herein in favor of Atlantic Mutual Insurance Company, intervening petitioner, by reason of the matters and things set forth in its intervening petition filed herein, said decree if and as the proof warrants, shall also further direct similar recovery in like form to each of said named underwriters in the respective sums according to the percentages of the total amount of such insurance underwritten by each of

said hereinbefore named underwriters, the amount of insurance underwritten by each of said named underwriters and also the amount of recovery, if any, as to each of said named underwriters to be established by proof; and it is further

[fol. 261] Stipulated, that nothing herein shall be considered as an agreement as to liability for damages or as to the extent of any damage sustained by cargo or as to the interest of any underwriter therein, or as to the character and terms of the contract of carriage of said cargo or any part thereof, or as to the character and terms of any contract relating to the insurance of said cargo; but all these matters shall be subject to proof in usual and regular manner if and when they may become material, and nothing in this stipulation shall be deemed as waiving any right of any of the parties to this action, the sole purpose hereof being to avoid multiplicity of pleadings.

Answers shall be filed to the intervening petition of Atlantic Mutual Insurance Company by the other parties to this cause within 20 days of the date of this stipulation; and it is stipulated that the intervening petitioner, Atlantic Mutual Insurance Company, need not file bond for costs.

Dated, Cleveland, Ohio, May 27th, 1934.

T. H. Garry, F. L. Leckie, Proctors for Interstate Steamship Company and Str. Willis L. King. Brown, Ely & Richard, Proctors for Great Lakes Transit Corp. and Str. George D. Dixon. Sanders, Hamilton, Dudley & Connelly, Proctors for Intervening Libelant, John Milko. Stanley & Gidley, Proctors for Intervening Libelant, Atlantic Mutual Insurance Company. Stanley & Gidley, Proctors for Home Insurance Co., and other herein named underwriters similarly situated.

[fol. 262] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO CERTAIN FACTS—Filed June 15, 1934

Cases Nos. 3168 and 3170

It is hereby stipulated by and between the proctors for the respective parties in the above consolidated cause and

proctors for the intervening libelant, Atlantic Mutual Insurance Company, and for the respective similarly situated underwriters claiming to have insured the cargo lately laden on board the Steamer George D. Dixon:

1. That the photostatic copy of policy rider form and conditions, a part of Schedule "A,"* attached to and made by reference a part of the intervening petition heretofore filed herein by Atlantic Mutual Insurance Company, is a true copy of the policy rider form and conditions issued by each of the several similarly situated underwriters named in a certain stipulation made by and between the parties hereto, dated May 27, 1934, excepting only as to the amounts and percentages of insurance respectively underwritten by each such similarly situated underwriter and the amount of premium payable therefore. That the total amount of insurance so issued was the sum of $1,100,000.00, of which the intervening petitioner Atlantic Mutual Insurance Company insured thirty per cent., and the respective similarly situated underwriters named in said stipulation insured seventy per cent., according to the percentages in said stipulation set forth.

2. That annexed hereto is a true copy of the Uniform Bill of Lading (marked Schedule "B"), approved by the Interstate Commerce Commission, and issued by Great Lakes Transit Corporation for the carriage and transportation of water-borne shipments and that a similar form of Bill of Lading was issued by Great Lakes Transit Corporation and accepted by the several cargo owners covering each shipment or consignment of cargo laden on board the [fol. 263] Steamer George D. Dixon at the time of the collision with the Steamer Willis L. King.

3. That annexed hereto, marked Schedule "C-1" and made a part hereof is a true copy of the Title Page of Local, Class and Commodity Tariff G. F. D. #118, S. B. #111, together with Rule 15 of Rules governing tariff, and annexed hereto and made a part hereof, marked Schedule "C-2" is a true copy of Rule 15 of Rules governing tariff as contained in Local, Joint and Proportional Freight Tariff I. C. C.

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* Note.—This Schedule was attached to and formed part of the Intervening Petition of Atlantic Mutual Insurance Company above referred to. (See page 254, supra.)

#83, both having been issued by the Great Lakes Transit Corporation as a common carrier by water, duly filed with the Interstate Commerce Commission and in full force and effect when the Steamer George D. Dixon was laden with cargo and began her voyage on August 9, 1933. That annexed hereto and made a part hereof are copies of Rules governing tariff as contained in the respective additional tariffs listed below, all of such tariffs having been issued by carriers other than Great Lakes Transit Corporation but containing joint or through rates applicable to shipments while in the possession of Great Lakes Transit Corporation as carrier, and such tariffs also having been duly filed with and approved by Interstate Commerce Commission and concurred in by Great Lakes Transit Corporation as such common carrier by water, and in full force and effect at the time cargo was loaded on board the said Steamer George D. Dixon, as aforesaid, such tariffs and tariff provisions being identified as follows:

Jones Tariff #508, I. C. C. #2470 (Schedule "C-3" attached hereto)

Seaboard Great Lakes I. C. C. #6, S. B. #10 (Schedule "C-4" attached hereto)

Jones Tariff #491, I. C. C. #2462 (Schedule "C-5" attached hereto)

Ransom Tariff #27, I. C. C. #82 (Schedule "C-6" attached hereto)

Curlette's Tariff #76, I. C. C. #A-346 (Schedule "C-7" attached hereto)

Jones Tariff #509-A, I. C. C. #2550 (Schedule "C-8" attached hereto)

Van Ummersen's Tariff #20-A, I. C. C. #200 (Schedule "C-9" attached hereto)

[fol. 264] Curlette's Tariff #42, I. C. C. #A-172 (Schedule "C-10" attached hereto)

Van Ummersen's Tariff #2-B, I. C. C. #110 (Schedule "C-11" attached hereto)—

That the various and several consignments of cargo so laden on board the Steamer George D. Dixon on the voyage involved herein, were shipped under and pursuant to the provisions of one or the other of the tariffs above referred to, or tariffs containing a rule identical with one of the rules attached hereto marked Schedule "C 1-11" inclusive, and

under form of bill of lading as aforesaid, and that the various and several rules and provisions attached hereto as Schedules "C 1-11" inclusive are all of the tariff provisions pertinent to the issues raised upon the intervening petition of Atlantic Mutual Insurance Company herein.

4. That as result of the collision between the Dixon and the King involved in this suit, a large amount of cargo on board the Dixon was lost and damaged and the cargo and owners became chargeable and liable for general average and like expenses in large amount; that as nearly as can now be estimated the amount of such cargo loss and damage is approximately $30,000, but the said amount cannot as yet be definitely ascertained on account of the fact that all claims therefor have not as yet been received by Great Lakes Transit Corporation and delay necessarily results in the receipt by it of all of such claims since many of them are presented in the first instance by cargo owners to the originating carriers, being ultimately forwarded to Great Lakes Transit Corporation. However, a large number of such claims have heretofore been received by Great Lakes Transit Corporation, and attached hereto marked Schedule "D" and made a part hereof, is a copy of one of said claims to which were attached at time of presentation to Great Lakes Transit Corporation the documents referred to therein, including original bill of lading, freight bill and in addition original or certified copies of invoices and other supporting documents which are omitted from the copy hereto attached to avoid repetition and inclusion of documents having no material bearing on the issues involved herein, it being hereby stipulated, however, that all claims of such cargo owners heretofore paid by Great Lakes Transit Corporation, as hereinafter stated, were in form having the same [fol. 265] legal force and effect as that attached hereto, marked Schedule "D," and were accompanied by all necessary supporting documents, and that all of such claims were treated, considered and when approved, were paid by Great Lakes Transit Corporation in the same manner without differentiation on account of any difference in the wording of the provisions of the several forms of tariff as set forth in the said Schedules "C 1-11" annexed hereto. A number of such claims were approved and paid by said Great Lakes Transit Corporation on various dates subsequent to the said collision and prior to January 22, 1934, the total amount

paid by Great Lakes Transit Corporation to such date on account thereof being $21,987.57, and all of such payments were made by checks delivered to and collected by such claimants of loss or damage to cargo in form similar to the specimen form attached hereto, made a part hereof and marked Schedule "E," the date of payment, number of claim, name of claimant, amount of payment and authorized signatures on behalf of the Great Lakes Transit Corporation having been duly inserted in the respective checks prior to delivery. That on or about January 22, 1934, Marsh & McLennan, Average Adjusters, prepared a partial statement of loss on cargo and adjustment of such claims approved and paid by Great Lakes Transit Corporation as aforesaid, to the said date, the names of said claimants and the amounts paid them respectively, being as set forth in copy of said adjustment attached hereto, made a part hereof and marked Schedule "F," and on behalf of Great Lakes Transit Corporation presented claim to the Atlantic Mutual Insurance Company and other similar underwriters, for reimbursement of the said amount, plus the expenses of Marsh & McLennan in connection with the case and for the said adjustment and copies, in the amount of $360.00, totaling $22,338.57, less the sum or $1,000.00 deductible average provided in said policies, such claim against underwriters being in the net amount of $21,338.57, and the amount of said deductible average being borne by Great Lakes Transit Corporation. That in and by said adjustment the said average adjusters apportioned the said sum of $21,338.57 among the various underwriters who had issued the policies of insurance hereinabove referred to; that said apportionment is set forth on the page of said adjustment headed "Apportionment of Loss among Underwriters"; that the underwriters listed under the heading "American Insur-
[fol. 266] ance" made payment by check directly to the Great Lakes Transit Corporation as follows:

		Date paid
Atlantic Mutual	$6,401.57	1/27/34
Home Insurance Co.	2,133.86	1/30/34
Union Marine & General	2,133.86	1/29/34
Sun Insurance Co.	1,707.09	1/29/34
Eagle Star & British Dom'ions	1,066.93	2/ 3/34
Fireman's Fund	853.54	1/29/34
Great American	640.16	1/29/34
	$14,937.00	

That the English underwriters made payment of their proportion thereof on the 21st day of April 1934; that this payment was made by the English correspondent of Marsh & McLennan, collecting from the English underwriters the amount payable by them, whereupon said English correspondent credited Marsh & McLennan with the amount of such claim and the latter made payment in dollars to the Great Lakes Transit Corporation of the amount thus credited. That when further claims not approved and paid on the date of said adjustment, to-wit: January 22, 1934, are received, approved and paid by the Great Lakes Transit Corporation, a further statement or statements will be made and payment will be made in like manner by the underwriters, and that finally when all data is at hand, a General Average statement will be prepared by said adjusters, and when this statement is approved by underwriters they will make payment to the Great Lakes Transit Corporation of cargo's proper proportion of General Average and like expenses in the same manner as they made payment under the adjustment of January 22, 1934.

5. That the corporate entity and the capacity to sue herein of intervening petitioner, Atlantic Mutual Insurance Company, as well of the respective similarly situated underwriters named in said stipulation, dated May 27, 1934, as having issued an aggregate of seventy per cent., of the total insurance claimed to cover the cargo lately laden on board the Steamer George D. Dixon, is expressly admitted herein for the purposes of this action.

6. That the premium provided in each of the policy rider forms referred to in paragraph "1" hereinabove, upon the policies of insurance above mentioned, was paid to underwriters by Great Lakes Transit Corporation.

[fol. 267] 7. That policies in substantially the same form as the said policy rider form made a part of Schedule "A" atttached hereto, were severally issued by Atlantic Mutual Insurance Company, and other underwriters, to Great Lakes Transit Corporation and were, in effect, for each year from 1928 to 1933 inclusive, and during all of said period general cargoes were carried and transported by vessels of the Great Lakes Transit Corporation named in the said policy rider form, pursuant to bill of lading in the

same form as that attached hereto marked Schedule "B," the respective consignments being carried under and pursuant to the several tariff provisions in Schedule "C 1-11" inclusive, annexed hereto, or provisions having the same legal force and effect. During said period numerous cases of loss and damage to such cargo have arisen as the result of perils of the sea, while carried in said vessels, and in each case the procedure adopted and carried out with respect to presentation of claims of cargo owners or shippers to Great Lakes Transit Corporation, examination, approval and payment of such claims by Great Lakes Transit Corporation, presentation of claim for reimbursement on its behalf to said Atlantic Mutual Insurance Company and other underwriters issuing similar forms of policy, and reimbursement thereof, less deductible average, by Atlantic Mutual Insurance Company and such other underwriters, to Great Lakes Transit Corporation, has been the same as the procedure set forth above with respect to the said loss and damage of the cargo of the Dixon on the voyage involved herein.

8. This stipulation is entered into for the purpose of permitting the Court to pass upon the legal rights of the Atlantic Mutual Insurance Company and other underwriters intervening herein, insofar as concerns the form of interlocutory decree to be entered, and shall be without prejudice to the right of any party to introduce or offer further evidence if such evidence be deemed to be material to any question or issue that may arise in connection with the intervening petitions of underwriters with respect to cargo, prior to the entry of final decree herein. The documents set forth in the Schedules attached hereto are stipulated to be true copies of the originals, and shall be considered as duly proven and offered in evidence, and each of the parties reserves the right to object to the materiality or relevancy

[fol. 268] of the said documents, or any of them, or of any of the other facts hereby stipulated.

Dated: June 13, 1934.

Duncan, Leckie, McCreary, Schlitz & Hinslea, Proctors for Interstate Steamship Company, and Steamer Willis L. King. Brown, Ely & Richards, Proctors for Great Lakes Transit Corporation, and Steamer George D. Dixon. Sanders, Hamilton, Dudley & Connelly, Proctors for Intervening Libelant, John Milko. Stanley & Gidley, Proctors for Intervening Libelant, Atlantic Mutual Insurance Company. Stanley & Gidley, Proctors for Home Insurance Company, and other herein named underwriters similarly situated.

SCHEDULE "A" *

[Special Cargo]

Atlantic Mutual Insurance Company

Chartered 1842

Atlantic Building 49-51 Wall Street, New York

[No. CP 97189]

Cash Participating Policy

As Per Form Attached

By this Special Policy of Insurance Great Lakes Transit Corporation for account of whom it may concern in case of loss to be paid in funds current in the United States, or in the City of New York to Great Lakes Transit Corporation, or order, Do make insurance and cause to be insured, lost or not lost, at and from April 15th, 1933, to December 12th, 1933, as per form attached. On First Interest, as per form attached.

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* This Schedule was attached to the Petition of Atlantic Mutual Insurance Company, page 254, supra.

[fol. 269] Sum Insured—$330,000—(Three hundred thirty thousand Dollars).

upon all kinds of lawful goods and merchandises, laden or to be laden on board the good ——, call the Vessels as per form attached, whereof is master for this present voyage, or whoever else shall go for master in the said vessel, or by whatever other name or names the said vessel, or the master thereof, is or shall be named or called.

Beginning the adventure upon the said goods and merchandises, from and immediately following the loading thereof on board of the said vessel, at —— as aforesaid, and so shall continue and endure until the said goods and merchandises shall be safely landed at —— as aforesaid, and it shall and may be lawful for the said vessel, in her voyage, to proceed and sail to, touch and stay at, any ports or places, if thereunto obliged by stress of weather or other unavoidable accident, without prejudice to this insurance. The said goods and merchandises, hereby insured, are valued (premium included) as per form attached.

Touching the adventures and perils which the said Atlantic Mutual Insurance Company is contented to bear, and takes upon itself in this voyage, they are of the seas, men-of-war, fires, enemies, pirates, rovers, thieves, jettisons, letters of mart and counterpart, reprisals, takings at sea, arrests, restrains, and detainments of all kings, princes or people, of what nation, condition or quality soever, barratry of the master and mariners, and all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the said goods and merchandise, or any part thereof. And in case of any loss or misfortune, it shall be lawful and necessary to and for the assured, —— factors, servants and assigns, to sue, labor, and travel for, in and about the defense, safeguard and recovery of the said goods and merchandises, or any part thereof, without prejudice to this insurance; nor shall the acts of the insured or insurers, in recovering, saving and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of an abandonment; to the charges whereof, the said Insurance Company will contribute according to the rate and quantity of the sum herein insured, having been paid the consideration for this insurance, by the assured or —— assigns, at and after the rate of 2.27%.

[fol. 270] Premium—$7,491.00.

And in case of loss, such loss to be paid in thirty days after proof of loss, and proof of interest in the said —— (premium if unpaid, being first deducted), but no partial loss or particular average shall in any case be paid, unless amounting to five per cent.

Warranted not to abandon in case of capture, seizure, or detention, until after condemnation of the property insured; nor until ninety days after notice of said condemnation is given to this Company. Also warranted not to abandon in case of blockade, and free from any expense in consequence of capture, seizure, detention or blockade, but in the event of blockade, to be at liberty to proceed to an open port and there end the voyage.

If the voyage aforesaid shall have been begun and shall have terminated before the date of this policy, then there shall be no return of premium on account of such termination of the voyage.

The within insurance is subject to the conditions and against the perils and risks as above and as shown on the pages following which are made a part of this policy.

In Witness Whereof, the President of the said Atlantic Mutual Insurance Company hath hereunto subscribed his name, and caused the same to be attested by its Secretary, in New York, the 23rd day of May, one thousand nine hundred and thirty three but this policy shall not be valid unless countersigned by the duly authorized representative of the Company at New York, N. Y.

Countersigned at New York this 24th day of May, 1933.

—— ——, Manager.

Examined SHB.

Copy. Broker's Copy.

Copy

Provided Always, and it is hereby further agreed, That if the said Assured shall have made any other assurance upon the premises aforesaid, prior in day of date to this policy, then the said Atlantic Mutual Insurance Company shall be answerable only for so much as the amount of such prior assurance may be deficient towards fully covering the premises hereby assured; and the said Atlantic

Mutual Insurance Company shall return the premium upon so much of the sum by them assured, as they shall be by [fol. 271] such prior assurance exonerated from. And in case of any insurance upon the said premises, subsequent in day of date to this policy, the said Atlantic Mutual Insurance Company shall nevertheless be answerable for the full extent of the sum by them subscribed hereto, without right to claim contribution from such subsequent Assurers, and shall accordingly be entitled to retain the premium by them received, in the same manner as if no such subsequent assurance had been made. Other insurance upon the premises aforesaid, of date the same day as this policy, shall be deemed simultaneous herewith; and the said Atlantic Mutual Insurance Company shall not be liable for more than a ratable contribution in the proportion of the sum by them insured to the aggregate of such simultaneous insurance. It is also agreed, that the property be warranted by the assured free from any charge, damage or loss, which may arise in consequence of a seizure or detention, for or on account of any illicit or prohibited trade, or any trade in articles contraband of war.

Memorandum.—It is also agreed, that bar, bundle, rod, hoop and sheet iron, wire of all kinds, tin plates, steel, madder, sumac, wicker-ware and willow (manufactured or otherwise), salt, grain of all kinds, tobacco, indian meal, fruits (whether preserved or otherwise), cheese, dry fish, hay, vegetables and roots, rags, hempen yarns, bags, cotton bagging, and other articles used for bags or bagging, pleasure carriages, household furniture, skins and hides, musical instruments, looking-glasses, and all other articles that are perishable in their own nature, are warranted by the assured free from average, unless general; hemp, tobacco stems, matting and cassia, except in boxes, free from average under twenty per cent. unless general; and sugar, flax, flax-seed and bread, are warranted by the assured free from average under seven per cent, unless general; and coffee in bags or bulk, pepper in bags or bulk, and rice, free from average under ten per cent., unless general.

Warranted by the insured free from damage or injury from dampness, change of flavor, or being spotted, discolored, musty or mouldy, except caused by actual contact of sea water with the articles damaged, occasioned by sea perils. In case of partial loss by sea damage to dry goods,

cutlery or other hardware, the loss shall be ascertained by a separation and sale of the portion only of the contents of the packages so damaged, and not otherwise and the same practise shall obtain as to all other merchandise as far as [fol. 272] practicable. Not liable for leakage on molasses or other liquids unless occasioned by stranding or collision with another vessel.

Including (subject to the terms of the policy), all risks covered by this policy from shippers' or manufacturers' warehouse until on board the vessel, during transshipment if any, and from the vessel whilst on quays, wharves, or in sheds during the ordinary course of transit until safely deposited in consignees' or other warehouse at destination named in policy, except that in respect to shipments to the River Plate, the risks under this insurance shall cease upon arrival at any shed (transit or otherwise), store, custom house or warehouse, or upon the expiry of ten (10) days subsequent to landing, whichever may first occur.

Including transit by craft, raft, and/or lighter to and from the vessel. Each craft, raft, and/or lighter to be deemed a separate insurance. The assured are not to be prejudiced by any agreement exempting lightermen from liability.

It is especially agreed, that when by its terms, this Policy includes the risk on railroad, dock, wharf, quay or elsewhere on shore as herein specified, this Company is liable for loss or damage caused by fire, collision, derailment, cyclones, hurricanes, flood (meaning the rising of navigable waters) or by accident to the conveyance or by collapse or subsidence of docks.

Held covered, at a premium to be arranged, in case of deviation or change of voyage, or other variation of the risk by reason of the exercise of any liberty granted to the ship-owner or charterer under the contract of affreightment, or of any omission or error in the description of the interest, vessel or voyage.

Held covered in the event of the goods (or any part thereof) hereby insured, being shut out and/or transferred to another vessel or vessels, provided written notice be given to the Company in all such cases as soon as known to the assured, and additional premium be paid if and as required.

In the event of the goods or any part thereof, being discharged short or carried beyond the port of destination,

the assurers hereby agree to hold the assured covered until final arrival and delivery of the goods at their proper port of destination and delivery, provided written notice be given the Company in all such cases as soon as known to the assured, and additional premium be paid if and as required.

[fol. 273] Warranted by the assured free from liability for any loss of or damage to goods in the possession of any carrier by land and/or water or in the possession of any other bailee who may be liable for such loss or damage by law, or under an insured bill of lading, or under a rate of freight that includes insurance; and free from any liability for goods shipped under a bill of lading containing a stipulation that the carrier may have the benefit of any insurance on such goods.

It is also warranted that any fire insurance granted herein shall be null and void to the extent of any fire insurance which the assured or any carrier, or other bailee has, at the time of the fire, and which would attach if this policy had not been issued.

It is, however, understood and agreed that this Company will assume liability for its proportion of any loss for which it would be liable in the absence of the two foregoing clauses, to the extent of the amount which would not be recoverable from third parties if this insurance did not exist; and for its proportion of expenses incidental to such loss.

The Assured are not to be prejudiced by the presence of the negligence clause and/or latent defect clause in the Bills of Lading and/or Charter Party. The seaworthiness of the vessel as between the Assured and the Assurers is hereby admitted and the wrongful act or misconduct of the shipowner or his servants causing a loss is not to defeat the recovery by an innocent Assured if the loss in the absence of such wrongful act or misconduct would have been a loss recoverable on the policy.

Warranted free of claim for loss of market or for damage or deterioration arising from delay, whether such delay be caused by an insured peril or otherwise.

Returned and used goods are insured free of particular average unless caused by stranding, sinking, burning, or collision with another vessel, and free of claim for theft, pilferage or non-delivery, unless otherwise agreed prior to shipment.

Unless otherwise specially provided for herein, this policy excludes the risks of theft, pilferage and/or non-delivery.

Unless otherwise specially provided for herein, this policy is free of claim for loss by breakage unless caused by standing or collision with another vessel.

[fol. 274] In case of damage affecting labels, capsules or wrappers, this Company, if liable therefor under the terms of this Policy, shall be liable only for an amount sufficient to pay the cost of new labels, capsules or wrappers and the cost of reconditioning the goods.

In case of claims for damage on Dry Goods or Hardware, exceeding fifteen per cent, the Company to have the privilege of settling upon the principle of a salvage loss, paying to the assured the sum insured, with the freight and the duties.

In case of claim on machinery under this policy, the adjustment to be made on the part lost or damaged, and the liability of the Company is not to exceed the insured value of such part, plus cost of forwarding the replacing part to destination.

General Average and Salvage charges payable according to Foreign Statement or per York-Antwerp Rules if in accordance with the contract of affreightment.

The risks covered by this policy are to include loss, damage or expense resulting from explosion, unless caused by perils excepted by clause No. 12.

No. 12

Warranted by the Assured free from claim on account of capture, seizure, detention or destruction, by or arising from hostile forces, riots, civil commotions, civil war, revolt, revolution or other armed opposition to Government, or by the acts of officers or other persons acting in the name of belligerents, or in pursuing warlike operations, whether before or after declaration of war, and any and all consequences thereof, whether specifically insured under other clauses of this policy or not.

Warranted by the Assured free from claim on account of loss or damage caused by strikers, locked-out workmen, labor riots or persons taking part in labor disturbances, and any and all consequences thereof, whether specifically insured under other clauses of this policy or not.

Warranted free of any claim based upon loss of or frustration of the insured voyage, or adventure, caused by arrests, restraints, or detainments of kings, princes, or peoples.

Proof of loss to be authenticated by the Agent of the Company, if there be one at the place such proofs are taken. [fol. 275] The Premium under this Policy is charged on a Cash Participating Basis, and in consideration thereof, any share in the profits of the Company declared as applicable to this Policy will be credited to the assured in cash.

—— ——, Manager.

Copy

First Interest

Great Lakes Transit Corporation

In consideration of Seven Thousand Four Hundred Ninety-one and 00/100 Dollars do insure, lost or not lost, Great Lakes Transit Corporation, for account of whom it may concern.

Loss, if any, payable to Great Lakes Transit Corporation, or order, to the amount of $330,000, being 30% of a total similar insurance of $1,100,000.

At and from April 15, 1933, to midnight (Chicago time), December 12, 1933, but it is agreed to hold covered beyond that date any cargo per vessels sailing from initial port prior to December 12, 1933, Midnight (Chicago time), until Great Lakes Transit Corporation's responsibility therefor ceases.

On cargo of any kind owned by the Assured and on the assured's liability to others in respect to cargo of any kind covering same from time said Great Lakes Transit Corporation becomes responsible therefor and until its responsibility ceases, wheresoever the same may be, including risks while on docks, in and/or on cars on docks, piers, wharves, lighters and/or craft, transfers, and all land conveyances, and also to cover upon any advances made by and payment of back charges made by or due from said Assured, and upon any charges of said Assured upon any and all cargo or any portion thereof; from the time the Assured becomes responsible for such cargo including risks of transshipment, and under and/or on deck on board of the Assured's steamers:

[fol. 276] Alfred H. Smith
C. T. Jaffray
Charles Donnelly
Daniel Willard
H. A. Scandrett
J. E. Gorman
J. M. Davis
Juniata

Delos W. Cooke	Milwaukee
Duluth	Octorara
Edward Chambers	P. E. Crowley
Edward E. Loomis	Tionesta
F. D. Underwood	Utica
Fred W. Sargent	W. J. Conners
George D. Dixon	W. W. Atterbury

and/or any other steamers owned, constructed, purchased, leased, or chartered by the Assured, on any voyage or voyages direct or otherwise, from port or ports on the Great Lakes to port or ports on the Great Lakes and on the rivers, channels and bays of the Great Lakes and/or intermediate points in either direction, and on board such steamers while at said places or ports. Also to cover through to destination goods delivered by the Assured to other water transportation companies for shipment to destination. In the event any cargo remains short shipped at the close of navigation, due to a peril insured against, this insurance to pay the cost of forwarding by all rail route, if required.

It is agreed that the term "cargo" as used in this Policy includes goods, wares, merchandise, live stock, express matter and checked baggage of every description, and where used in this form it includes also duties and all advances made by and payment of back charges made by or due from said Assured and/or charges of said Assured upon any and all cargo or any portion thereof.

It is agreed between the parties hereto that said steamers are to be employed in carrying cargo, or cargo and passengers, in and on said steamers as aforesaid, the Assured taking upon themselves as to said cargo, or parts thereof, all the risks, perils and liabilities which by law a common carrier by land or water assumes, and also the insurance of said cargo against perils of the seas and lakes, fire, jettisons, barratry, negligence of master or mariners, loss or damage arising through explosions howsoever or wheresoever occurring, bursting of boilers, breakage of shafts or through any latent defect in the machinery or hull, and all other acts, perils or misfortunes that have or shall come to the hurt, detriment, damage to or loss of the said cargo or any part thereof, and the said Assurers agree and under- [fol. 277] take to indemnify and hold harmless the said As-

sured against hurt, detriment, damage to or loss of such cargo from any and all such risks, perils, acts or misfortunes, to the extent which the Assured may be held by the owners thereof, under any liability the Assured shall have assumed as common carriers, insurers, or otherwise, and for any and all claims which said cargo may be called upon to contribute in General Average, and/or for salvage, landing, warehousing and/or special charges, and to cover in like manner duties and any cargo owned by the Assured, and also all advances made by and payment of back charges made by or due from said Assured and/or charges of said Assured upon any and all cargo or any portion thereof.

Notwithstanding anything herein to the contrary underwriters are not to be liable for any claim with respect to cargo carried on spar deck caused by wet, leakage or exposure but this shall not be construed to exclude General Average or Salvage Charges or claims arising from jettison or washing overboard.

It is understood and agreed that shipments in refrigerators are also covered against damage to or deterioration of goods if occasioned by the break down or derangement of refrigerating machinery and/or insulation and/or piping and/or if the vessel be delayed or deviates in consequence of break down or derangement of machinery, rudder or sternpost.

It is agreed that said steamers shall, while having such cargo on board, have the privilege of sailing, with or without pilots, of towing and being towed and assisting vessels and/or craft in all situations and to any extent and to render salvage services, of laying up, being docked, undocked and of changing docks, moving in harbour, going on graving docks, dry docks, ways, slipways, railways, gridirons, pontoons, and of adjusting compasses, etc., howsoever, whensoever or wheresoever as often as may be done and for mechanics and/or others to work on board at any time, without prejudice to this insurance.

Liability under this policy for any loss or losses, claim or claims arising in respect to each cargo while on board of each of the above named steamers and/or substituted steamers and/or additional steamers including connecting water conveyances or in respect to cargo while on docks, wharves or elsewhere on shore as the result of any one

occurrence, is hereby limited to 30% of the sum of $100,000. [fol. 278] Permission is granted for Excess Insurance which shall be liable only for any loss and/or losses, claim and/or claims beyond the sum of $100,000 on each cargo of each steamer including connecting water conveyances or on cargo while on docks, wharves or elsewhere on shore as the result of any one occurrence.

In case of any loss or misfortune, it shall be lawful to and for the Assured, their factors, servants and assigns, to sue, labor and travel for, in and about the defence, safeguard and recovery of the said cargo, or any part thereof, without prejudice to this insurance; nor shall the acts of the Assured or Assurers in recovering, saving and preserving the property insured, in case of disaster be considered a waiver or an acceptance of abandonment; to the charges whereof the said Assurers will pay as herein provided.

In case of loss, such loss to be paid thirty days after proof of loss and proof of interest are furnished to this company. There shall, however, be deducted from the aggregate of all claims on each east bound or west bound passage, the sum of $1,000.

It is especially understood and agreed that the protection given by this Policy remains in full force and effect during the whole period insured and is not reduced by the amount of any loss or losses collected hereunder.

Seaworthiness of vessels is admitted under this Policy as between the Assured and this Company.

Warranted by the Assured that shipments of iron ore and grain in bulk will not be carried at "Insured" rates of freight and that the Assured will not assume responsibility for marine perils in connection with such shipments.

This Policy shall not be vitiated by any unintentional error in description of voyage or interest, cargo, trade, locality, or by any deviation, provided the same be communicated to the Assurers within reasonable time after known to the Assured, and an additional premium paid if required.

To return net one-tenth of one per cent of the total premium charged on this Policy on each vessel respectively for each 15 consecutive days between April 25th and Novem-

ber 30th not engaged in operation and no risk incurred hereunder during such time with respect to such vessel or vessels; provided that in the case of the Steamers "Juniata," "Octorara" and "Tionesta" returns are to be allowed only during the period between June 5th and September 25th. No return to be allowed for the time any [fol. 279] vessel is not engaged in operation due to casualty.

The premium on this policy having been computed in part on an estimated total carriage of 450,000 tons of flour and/or other mill products during the currency of this insurance, it is hereby provided that upon expiration of this contract the Assured will report to these underwriters the total actual number of tons of flour and/or other mill products carried by them. If the total number of tons exceeds 450,000 these underwriters are to receive additional premium for each 1,000 tons of such excess at .06945% of the total premium on this policy and if the total number of tons is less than 450,000 these underwriters are to return premium on the same basis on the deficiency.

It is agreed that on the first day of each calendar month or as soon thereafter as may be practicable, the Assured shall report to Marsh & McLennan, Incorporated, for transmission to these Assurers, the total of cargo tonnage by classification of commodities moved during the previous month.

It is further agreed that the Assured shall report monthly to Marsh & McLennan, Incorporated, for transmission to these Assurers, the amount of grain held in their vessels for winter storage subsequent to December 12, 1933, and to pay premium thereon at the rate of 2½¢ per $100 of value per month. For the purpose of calculation of premium, market value of grain in winter storage as of the 15th day of each month is to be employed.

It is hereby understood and agreed that this insurance shall not be prejudiced in the event the Assured has or may release the lessors of property which the Great Lakes Transit Corporation leases in the operation of their business.

The terms and conditions of this form are to be regarded as substituted for those of the Policy to which it is attached, the latter being hereby waived.

Attached to Policy No. CP 97189 of the Atlantic Mutual Insurance Company.

Marsh & McLennan
Incorporated
80 Maiden Lane
New York City

[fol. 280] SCHEDULE "B"

1st Sheet

(Uniform Domestic Straight Bill of Lading, adopted by Carriers in Official, Southern and Western Classification territories, March 15, 1922, as amended August 1, 1930.)

Shipper's No. —.
Agent's No. —.

Uniform Straight Bill of Lading

Original—Not Negotiable

Great Lakes Transit Corporation

Received, subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading,

At 193
From .....

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof,

which are hereby agreed to by the shipper and accepted for himself and his assigns.

(Mail or street address of consignee—For purposes of notification only)

Consigned to .....

Destination ..... State of ..... County of .....

Route .....

Delivering Carrier ..... Car Initial ..... Car No. .....

No. Packages	Description of Articles, Special Marks, and Exceptions	*Weight (Subject to Correction)	Class or Rate	Check Column

[fol. 281]

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

.....
(Signature of consignor.)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

.....

Received $.....
to apply in prepayment of the charges on the property described hereon.

.....
(Agent or Cashier)

Per .....
(The signature here acknowledges only the amount prepaid.)

Charges advanced:

$.....

* If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

Note—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding ..... per .....

..... Shipper. ..... Agent.

Per ..... Per .....

Permanent post-office address of shipper .....

Contract Terms and Conditions

Sec. 1. (a) The carrier or party in possession of any of the property herein described shall be liable as at common

law for any loss thereof or damage thereto, except as hereinafter provided.

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage. The carrier's liability shall be that of warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of delivery of the property to the party entitled to receive it, has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or from riots or strikes.

(c) In case of quarantine the property may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the carriers' dispatch at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when property is so discharged, or property may be returned by carrier at owner's expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to property shall be borne by the owners of the property or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done by quarantine regulations or authorities even though the same may have been done by carrier's officers, agents, or employees, nor for detention, loss, or damage of any kind occasioned by quarantine or the enforcement thereof. No carrier shall be liable,

[fol. 282] except in case of negligence, for any mistake or inaccuracy in any information furnished by the carrier, its agents, or officers, as to quarantine laws or regulations. The shipper shall hold the carriers harmless from any expense they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

Sec. 2. (a) No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value plus freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

(c) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid

the policies or contracts of insurance: Provided, That the carrier reimburse the claimant for the premium paid thereon.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton or cotton linters is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership (and prompt notice thereof shall be given to the consignor), and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 4. (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs, lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman, only, or at the option of the carrier, may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

(b) Where nonperishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it, or said consignee or party entitled to receive it fails to receive it within 15 days after notice of arrival shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by

the carrier: Provided, That the carrier shall have first mailed, sent, or given to the consignor notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the prop- [fol. 283] erty, the name of the party to whom consigned, or, if shipped order notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published: Provided, That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

(c) Where perishable property which has been transported hereunder to destination is refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage at private or public sale: Provided, That if time serves for notification to the consignor or owner of the refusal of the property or the failure to receive it and request for disposition of the property, such notification shall be given, in such manner as the exercise of due diligence requires, before the property is sold.

(d) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under this section shall be applied by the carrier to the payment of freight, demurrage, storage, and any other lawful charges and the expense of notice, advertisement, sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance it shall be paid to the owner of the property sold hereunder.

(f) Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and, except in case of carrier's negligence, when received from or delivered to such stations, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from locomotive or train or until loaded into and after unloaded from vessels.

Sec. 5. No carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 6. Every party, whether principal or agent, shipping explosives or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by such goods, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. Provided, that, where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be

found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and, in such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, [fol. 284] shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. Nothing herein shall limit the right of the carrier to require at the time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election of common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. (a) If all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to all the terms and provisions of, and all the exemptions from liability contained in, the Act of the Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc.," and of other statutes of the United States according carriers by water the protection of limited liability, and to the conditions contained in this bill of lading not inconsistent therewith or with this section.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the property herein described shall be at liberty to call at any port or ports, in or out of the customary route, to tow and be towed, to transfer, transship, or lighter, to load and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry the same upon deck.

(d) General Average shall be payable according to the York-Antwerp Rules of 1924, Sections 1 to 15, inclusive, and Sections 17 to 22, inclusive, and as to matters not covered thereby according to the laws and usages of the Port of New York. If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from faults or errors in navigation, or in the management of the vessel, or from any latent or other defects in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defects or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees and/or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

(e) If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier

or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this bill of lading.

(f) The term "water carriage" in this section shall not be construed as including lighterage in or across rivers, harbors, or lakes, when performed by or on behalf of rail carriers.

Sec. 10. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

[fol. 285] SCHEDULE "C-1"

S. B. No. 111
Cancels S. B. No. 81

Only two supplements to this tariff will be in effect at any time, except as provided for on page 18.

G. F. D. No. 118
Cancels G. F. D. No. 98

Great Lakes Transit Corporation

Local Class and Commodity Tariff Applying Between and from and to Lake Ports of this Corporation shown on Page 5

Governed, except as otherwise provided herein, by the Official Classification (issued by D. T. Lawrence, Agent) S. B.—O. C. No. 6, Supplements thereto or reissues thereof.

The rates named herein, for all-water-transportation, are subject to suspension at the close of navigation and restoration on the opening of navigation of the Great Lakes Transit Corporation, on notice as provided on page 18.

Rates named herein include marine insurance.

Issued August 25, 1932. Effective September 10, 1932.

Issued by W. E. Emblidge, Assistant General Freight Agent. F. W. Dever, Freight Traffic Manager.

Received, Month, —— ; Day, ——; Year, ——.

Great Lakes Transit Corporation Building, 223 Erie Street, Buffalo, N. Y.

(o13720) Printed in U. S. A.

[fol. 286] Rule No. 15.

Marine Insurance

Rates Named Herein Include Marine Insurance

While shipments subject to rates named herein as including Marine Insurance are water-borne at and between lake ports, on the vessels of the Great Lakes Transit Corporation, said corporation assumes liability for loss or damage to said shipments caused by marine perils, to wit: Of the seas and lakes, fire, collision, stranding, jettisons, pirates, assailing thieves, barratry of the master or mariners and all other perils or misfortunes that have or shall come to the hurt or damage of said property, or any part thereof, including general average charges and expenses for which the owner may, under the Maritime Law, be chargeable, but excluding the risks of riots, war or insurrections; any loss from said marine perils for which said Corporation is liable hereunder, to be paid sixty days after proof of loss and proof of interest in said property have been furnished.

Schedule "C-2"

G. L. T.—I. C. C. No. 83.

Issued Mar. 1, 1929.

Effective April 20, 1929.

Rule No. 35.

Marine Insurance

Rates Named Herein Include Marine Insurance

While shipments carried under this tariff are water-borne at and between lake ports, on the vessels of the Great Lakes Transit Corporation, said Corporation assumes liability for loss or damage to said shipments, caused by marine perils, to wit: Of the seas and lakes, fire, collision, stranding, jettisons, pirates, assailing thieves, barratry of the master or mariners, and all other perils or misfortunes that have or shall come to the hurt or damage of said property or any part thereof, including general average charges and expenses for which the owner may under the maritime law be chargeable, but excluding the risks of riots, war or insurrection; any loss from said marine perils for which

said corporation is liable hereunder, to be paid sixty days after proof of loss and proof of interest in said property have been furnished.

[fol. 287] SCHEDULE "C-3"

I. C. C. No. 2470,
Effective December 3, 1931.

Central Freight Assn.
Jones Freight Tariff No. 508.
Issued October 28, 1931.

Rule No. 160.

Governing Marine Insurance on Rail and Lake Traffic

While shipments carried under this tariff are water-borne at and between lake ports on the vessels of the Great Lakes Transit Corporation, the lake carrier and the rail carrier delivering the property to the lake carrier jointly and severally assume liability for loss or damage to said shipments caused by marine perils, to wit: Of the seas and lakes, fire, collision, stranding, jettisons, pirates, assailing thieves, barratry of the master or mariners and all other perils or misfortunes that have or shall come to the hurt or damage of said property or any part thereof, including general average charges and expenses for which the owner may under the maritime law be chargeable, but excluding the risks of riots, war, or insurrection, any loss from said marine perils for which the Lake Line or the Rail Line is liable hereunder to be paid sixty days after proof of loss and proof of interest in said property are furnished said company.

SCHEDULE "C-4"

S. B. No. 10,
Effective April 10, 1932.

Seaboard-Great Lakes I. C. C. No. 6.
Issued April 5, 1932.

Rule No. 35.

Marine Insurance

While shipments carried under this tariff are water-borne at and between River, Canal or Lake ports on the vessels of the Seaboard-Great Lakes Corporation and Great Lakes

Transit Corporation, each of said Corporations, as its interest may appear, assumes liability for loss or damage to said shipments, caused by marine perils, to wit: Of the seas, rivers, canals and lakes, fire, collision, stranding, jettisons, [fol. 288] pirates, assailing thieves, barratry of the master or mariners, and all other perils or misfortunes that have or shall come to the hurt or damage of said property or any part thereof, including general average charges and expense for which the owner may under the maritime law be chargeable, but excluding the risks of riots, war, or insurrections, any loss from said marine perils for which the lake line or the Canal line is liable hereunder, to be paid sixty days after proof of loss and proof of interest in said property are furnished.

SCHEDULE "C-5"

Jones Tariff No. 491.
Issued Nov. 23, 1932. Effective Jan. 1, 1933.

Rule No. 40.

Marine Insurance

While shipments subject to rates named in tariff, as amended, are water-borne at and between lake ports, on the vessels of the G. L. T. Corp., M. A. T. Co., N. U. S. S. Co., Spokane S. S. Co., and Western T. Co., said carriers assume liability for loss or damage to said shipments caused by marine perils, to wit: Of the seas and lakes, fire, collision, stranding, jettisons, pirates, assailing thieves, barratry of the master or mariners and all other perils or misfortunes that have or shall come to the hurt or damage of said property, or any part thereof, including general average charges and expense for which the owner may, under the Maritime Law, be chargeable, but excluding the risks of riots, war or insurrections; any loss from said marine perils for which said carriers are liable hereunder, to be paid sixty days after proof of loss and proof of interest in said property have been furnished.

SCHEDULE "C-6"

Ransom's Tariff No. 27. I. C. C. No. 82,
Issued May 26, 1932. Effective June 29, 1932.

Rule No. 140 A.

(b) Rates named in this Tariff include Marine Insurance while in possession of the Canada Atlantic Transit Company of U. S. or Great Lakes Transit Corporation.
[fol. 289] Liability of Carriers When Rates Include Marine Insurance: Property moving under rates named or provided for in this Tariff, while in the custody of the water carriers, from the time they receive it from shipper or from prior connecting carrier on docks, piers, wharves, bulkheads, platforms, lighters and/or craft transfers and land conveyances at ports of loading of their vessels and while it is water borne on vessels at and between ports and while it is on docks, piers, wharves, bulkheads, platforms, lighters and/or craft, transfers and land conveyances at port of discharge of vessels, until it is delivered to consignee (but not beyond the free time allowed for delivery as designated by tariff lawfully on file with the Interstate Commerce Commission and/or the United States Shipping Board as the case may be, nor while held by the water carrier as warehouseman) or until it is delivered to connecting carriers thereat, is insured:

While water borne against the perils of the seas, rivers, lakes, bays, canals and other waters, fire, collision, stranding, jettison, pirates, assailing thieves, barratry of the master or mariners, and other like perils or misfortunes that have or shall come to the hurt or damage of the said property or any part thereof, including general average charges and expenses for which the owner may under the maritime law be chargeable.

While on docks, piers, wharves, bulkheads, platforms, transfers and land conveyances, against the risks of fire, lightning, floods (meaning rising of navigable water) cyclones, hurricanes, tornadoes, wind-storms, derailment and/or accident to and/or overturning of the land conveyances, the collapse and/or subsidence of docks, piers, wharves, bulkheads, platforms and/or of any buildings thereon.

In no event, however, is the property insured against loss, damage or expense caused directly or indirectly by war, strikes, locked-out workmen, persons taking part in labor disturbances, riots, civil commotions, rebellions or insurrections.

The cost of marine insurance will not be participated in by the rail carriers.

[fol. 290] SCHEDULE "C-7"

I. C. C. No. A-346.

Curlett's Freight Tariff No. 76,
Item No. 830,

Issued October 29, 1931. Effective December 3, 1931.

Marine Insurance

While shipments carried under this tariff are water-borne at and between lake ports on the vessels of the Great Lakes Transit Corporation, the lake carrier and the rail carrier delivering the property to the lake carrier jointly and severally assume liability for loss or damage to said shipments caused by marine perils, to wit: of the seas and lakes, fires, collision, stranding, jettisons, pirates, assailing thieves, barratry of the master or mariners, and all other perils or misfortunes that have or shall come to the hurt or damage of said property or any part thereof, including general average charges and expenses for which the owner may under the maritime law be chargeable, but excluding the risks of riots, war or insurrection; any loss from said marine perils for which the lake line or the rail line is liable hereunder to be paid 60 days after proof of loss and proof of interest in said property are furnished said company.

SCHEDULE "C-8"

Central Frt. Assn. (Jones).

Freight Tariff No. 509-A.

Issued May 27, 1932. Effective July 18, 1932.

Rule No. 60.

Marine Insurance

While shipments subject to rates named herein are water-borne at and between lake ports, on the vessels of the

C. A. T. Co., C. P. Ry., S. S. L., G. L. T. Corp., M. A. T. Co. or N. N. Co., said carriers assume liability for loss or damage to said shipments caused by marine perils, to wit: Of the seas and lakes, fire, collision, stranding, jettisons, pirates, assailing thieves, barratry of the master or mariners and all other perils or misfortunes that have or shall come to the hurt or damage of said property, or any part thereof, including general average charges and expense for which the owner may, under the Maritime Law, be chargeable, but excluding the risks of riots, war or insurrections; any loss from said marine perils for which said [fol. 291] C. A. T. Co., C. P. Ry., S. S. L., G. L. T. Corp., M. A. T. Co. or N. N. Co. is liable hereunder, to be paid sixty days after proof of loss and proof of interest in said property have been furnished.

SCHEDULE "C-9"

I. C. C. No. 200.
Van Ummersen Tariff.
Issued January 1, 1933. Effective 2/15/33.

Rule No. 200.

Liability of Carriers When Rates Include Marine Insurance or When Property is Insured, as Provided in Rule No. 205

Property moving under rates named or provided for in this tariff, while in the custody of the water carriers, from the time they receive it from shipper or from prior connecting carrier on docks, piers, wharves, bulkheads, platforms, lighters and/or craft, transfers and land conveyances at ports of loading of their vessels and while it is water-borne on vessels at and between ports and while it is on docks, piers, wharves, bulkheads, platforms, lighters and/or craft, transfers and land conveyances at port of discharge of vessels, until it is delivered to consignee (but not beyond the free time allowed for delivery as designated by tariff lawfully on file with the Interstate Commerce Commission and/or the United States Shipping Board, as the case may be, nor while held by the water carrier as warehouseman) or until it is delivered to connecting carriers thereat, is insured:

While Waterborne, against the perils of the seas, rivers, lakes, bays, canals and other waters, fire, collision, stranding, jettison, pirates, assailing thieves, barratry of the master or mariners, and other like perils or misfortunes that have or shall come to the hurt or damage of the said property or any part thereof, including general average charges and expenses for which the owner may under the maritime law be chargeable.

While on Docks, Piers, Wharves, Bulheads, Platforms, Transfers and Land Conveyances, against the risks of fire, lightning, floods (meaning rising of navigable waters) cyclones, hurricanes, tornadoes, windstorms, derailment and/or accident to and/or overturning of the land conveyances, [fol. 292] the collapse, and/or subsidence of docks, piers, wharves, bulkheads, platforms and/or of any buildings thereon.

In no event, however, is the property insured against loss, damage or expense caused directly or indirectly by war, strikes, locked-out workmen, persons taking part in labor disturbances, riots, civil commotions, rebellions or insurrections:

Rule No. 205.

Marine Insurance (see Rule No. 200)

Rates Named in This Tariff Include Marine Insurance While in Possession of the Following Carriers

Canada Atlantic Transit Company
Central Vermont Transportation Co.
Cleveland & Buffalo Transit Co.
Detroit & Cleveland Navigation Co.
Eastern Steamship Lines, Inc.
Goodrich-West Ports Steamship Co.
Great Lakes Transit Company
Merchants & Miners Transportation Co.
Newark Terminal & Transportation Company
New England Steamship Company
Ocean Steamship Co. of Savannah
Pere Marquette Line Steamers
Starin New Haven Line
Wisconsin & Michigan Transportation Co.

SCHEDULE "C-10"

Trunk Line's I. C. C. No. A-172
Issued September 27, 1926 Effective November 5, 1926.

Marine Insurance

While shipments carried under this tariff are waterborne at and between lake ports on the vessels of the Canadian Pacific Railway's Steamship Line, Cleveland & Buffalo Transit Co., Detroit & Cleveland Navigation Co., Great Lakes Transit Corporation, Minnesota-Atlantic Transit Co., Northern Navigation Co. (Ltd.) or Rutland-Lake Michigan Transit Co., the lake carrier and the rail carrier delivering the property to the lake carrier jointly and severally assume liability for loss or damage to said shipments caused [fol. 293] by marine perils, to wit: of the seas and lakes, fire, collision, stranding, jettisons, pirates, assailing thieves, barratry of the master or mariners, and all other perils or misfortunes that have or shall come to the hurt or damage of said property or any part thereof, including general average charges and expenses for which the owner may under the maritime law be chargeable, but excluding the risks of riots, war or insurrections, any loss from said marine perils for which the lake line or the rail line is liable hereunder to be paid 60 days after proof of loss and proof of interest in said property are furnished said company.

SCHEDULE "C-11"

Van Ummersen's I. C. C. No. 110.
C. R. C. No. 94.
Issued February 8, 1930 Effective March 15, 1930.

Rule No. 65.

Marine Insurance

While shipments carried under this tariff are waterborne at and between the lake ports on the vessels of the Canada Atlantic Transit Co., Canadian Pacific Railway's Steamship Line, Central Vermont S. S. Line, Cleveland & Buffalo Transit Co., Detroit & Cleveland Navigation Co., Great Lakes Transit Corporation, New England S. S. Lines, Minnesota-Atlantic Transit Company or Northern Navigation Co. (Ltd.), the lake carrier and the rail carrier delivering the property to the lake carrier jointly and severally assume liability for loss or damage to said shipments caused by marine perils, to wit: of the seas and lakes, fire, collision, stranding, jettisons, pirates, assailing thieves, barratry of the master or mariners, and all other perils or misfortunes that have or shall come to the hurt or damage of said prop-

erty or any part thereof, including general average charges and expenses for which the owner may under the maritime law be chargeable, but excluding the risks of riots, war, or insurrections; any loss from said marine perils for which the lake line or the rail line is liable hereunder to be paid 60 days after proof of loss and proof of interest in said property are furnished said company.

[fol. 294] SCHEDULE "D"

Arbuckle Brothers'

Traffic Department, 71 Water Street, New York City

Standard Form for Presentation of Loss and Damage Claims

1816-S
(Claimant's Number).

September 25th, 1933.

Mr. V. F. Carbone, General Agent, Great Lakes Transit Corporation, 229 North Plankinton Avenue, Milwaukee, Wisconsin.

This claim for $25.48 is made against the carrier named above by Arbuckle Bros., New York, for L/D in connection with the following described shipments:

Description of shipment: Sugar.
Name and address of consignor (shipper): Arbuckle Brothers, New York.
Shipped from Brooklyn, New York, to Milwaukee, Wisc.
Final Destination: Milwaukee, Wisc.
Routed via Hedger Transportation, c/o Grt. Lakes Transit.
Bill of lading issued by Hedger Transportation Co.
Date of Bill of Lading: July 20th, 1933.
Paid Freight Bill (Pro) Number 4211 8/9/33.
Original Car Number and Initial Grt. Lakes Trans. Boat "Dixons" Ex Hedger Barge "Ned Hedger."
Name and address of consignee (whom shipped to): H. M. Zander Company, Milwaukee, Wisc.
If shipment reconsigned en route, state particulars: ——

Detailed Statement Showing How Amount Claimed is Determined

(Number and description of articles, nature and extent of loss or damage, invoice price of articles, amount of claim, etc.)

Sugar Received at Destination in a Damaged Condition

Three Hundred and Forty (340) Pounds Extra Fine Gran—340# @ $4.70 per cwt	$15.98
One (1) Bag 4/25s Extra Fine Gran—100# @ $4.85 per cwt.	4.85
Freight on 1,754# @ 26½ per cwt.	4.65
Total Amount Claimed	$25.48

[fols. 295-296] In addition to the information given above, the following documents are submitted in support of this claim:

( ) 1. Original bill of lading, if not previously surrendered to carrier.
( ) 2. Original paid freight ("expense") bill.
( ) 3. Original invoice or certified copy.
4. Other particulars obtainable in proof of loss or damage claimed: Original Bill of Lading—Copy of Freight Bill.

Remarks: ——.

The foregoing statement of facts is hereby certified to as correct.

Arbuckle Bros., R. W. Kruse, Traffic Manager.
Per EJD.

SCHEDULE "E"

Claim Draft No. 5000.

R. A. O. A. F. 235

Great Lakes Transit Corporation,

In full settlement of your Claim No. ——. Our No. ——. Our Agent at ——. Claim No. ——, or various claims listed on statement attached. —— Dollars.

Buffalo, N. Y.

Approved: —— ——, Freight Claim Agent.
Approved: —— ——, Freight Traffic Mgr.
At Sight Pay to the Order of —— ——, $——.

Payable at Option of Holder Through any Bank. No Protest.

—— ——, Auditor. —— ——, Comptroller

To Treasurer: Great Lakes Transit Corp. 223 Erie St. Buffalo, N. Y.

SCHEDULE "F"

G.L.T. Claim	MFST No.	Claimant		Claim	Salvage	Net
20082	20428	American Sugar Refining Co.				
		To labor recoopering 48 Bx. 24/1# Con. Sugar & 15 Bx. 24/1# Brown Sugar	$5.25			
		Rejected a/c damage				
		1 Bx. 12/2# Tabs. 24# @ $7.85 cwt	1.88			
		4 " 24/1# Con. 96# @ 5.95 "	5.71			
		3 " 24/1# Brown 72# @ 5.70 "	4.10			
			16.94			
		Freight on 216# @ 24½¢ cwt.	.53	17.47	9.24	8.23
19598	20538	Thomson & Taylor Co.				
		5 Bags Pepper short (withheld @ Detroit)				
		5 " " @ $13.81	$69.05			
		Freight on 660# @ .63¢ cwt.	4.16	73.21	26.72	46.49
19469	20424	Ambrosia Chocolate Co.				
		32 Bags Cocoa Beans short (withheld @ Detroit)				
		5000# net @ $4.95	247.50			
		Freight—5074# @ .29¢ cwt.	14.71	262.21	48.09	214.12
19468	20422	Ambrosia Chocolate Co.				
		108 Bags Cocoa Beans short (withheld @ Detroit)				
		15089# net @ $4.65	701.64			
		Freight 15322# @ .29¢	44.43	746.07	162.29	583.78
19467	20423	Ambrosia Chocolate Co.				
		224 Bags Cocoa Beans short (withheld @ Detroit)				
		2 " " " " used in replacing 6 bags wet and damaged and short				
		226 Bags or 31,658# net @ $4.65	1,472.09			
		Freight 32,143# @ .29¢ cwt.	93.21	1,565.30	336.61	1,228.69

19470	20419	Ambrosia Chocolate Co.				
		6 Bags Cocoa Beans short (withheld @ Detroit)				
		2108# net @ $4.95	104.35			
		Freight 2115# @ .34¢	7.19	111.54	9.01	102.53
20120	3940	Ad. Seidel & Sons				
		11 Cs. Canned Apples short (withheld @ Detroit & Chicago)				
		2 Cans Ditto short " " " " "				
		5-2/3 Dz. @ $3.50	19.83			
		Less trade rebate	.57			
			19.26			
		Freight 485# @ .35¢ cwt.	1.70	20.96	7.15	13.81
19521	20536	Thomson & Taylor Co.				
		66 Bags Pimentos short (withheld @ Detroit)				
		66 Bags @ $6.67	440.22			
		Freight 9966# @ 63¢ per cwt.	63.00	503.22	297.00	206.22
19846	20453	Sears, Roebuck & Co.				
		3 Bales Rugs short (withheld @ Detroit)				
		133 Yds. @ .67¢	89.11			
		Less 4%	3.56			
			85.55			
		Freight 120# @ 1.33	1.60	87.15	15.00	72.15
19799	Various	Dryden Rubber Company				
	20527	60 Bales Rubber Damaged & Rejected		866.16	414.22	451.94
	20528	21 " " " "		303.17	144.98	158.19
	20541	208 " " " "		3,002.67	1,435.95	1,566.72
	20545	173 " " " "		2,959.80	1,357.69	1,602.11

Brought forward:

[fols. 299-300]

G.L.T. Claim	MFST No.	Claimant		Claim	Salvage	Net
19512	20377	F. W. Woolworth Co.				
		1-5/12 Dz. #300-10 Dz. Mugs broken & worthless	2.03			
		1-5/12 Dz. @ $1.43	.09	2.12	.....	2.12
		Freight				
19638	20471	The Great Atlantic & Pacific Tea Co.				
		2 Crtns. Chili Sauce short broken & worthless		2.24	.....	2.24
		2 Crtns. @ $1.12				
19801	20524	Marshall Field & Co.				
		Following shortage (withheld @ Detroit)				
		5 Dz. Childrens Gowns #31213 @ $3. Dz.	15.00			
		30 Dz. " Kimonas #31203 @ 3. Dz.	90.00			
		3 Dz. " " #31204 @ 1.60 "	4.80			
		4 Dz. " " #31206 @ 2.55 "	10.20			
		9 Dz. " " @ 2.65 "	23.85	143.85	76.00	67.85
19975	20521	Stein, Hall Mfg. Co.				
		51 Bags Tapioca short (withheld @ Detroit)	208.08			
		10404# Tapioca @ $2. per cwt.	35.19	243.27	125.00	118.27
		Freight 10506# @ 33½¢ per cwt.				
19475	20530	Featheredge Rubber Co.				
		152 Bales Rubber damaged and rejected.	2,053.56			
		34226# @ .06 per lb.	6.85	2,060.41	1,011.16	1,049.25
		Rubber Ass'n Fee				
19939	20432	Geo. E. Keiser				
		3201# Sugar short a/c torn bags @ 5.03	166.04			
		534 Bags damaged & sold at discount of .30¢	160.20	326.20	.....	326.24

[fols. 299-300]

G.L.T. Claim	MFST No.	Claimant		Claim	Salvage	Net
19592	20431	Geo. E. Keiser				
	300 Bales	10/10s Sugar short (withheld @ Detroit)				
		30,000# @ $5.18		1,554.00	470.00	1,084.00
19593	20433	Geo. E. Keiser				
		122 Bales 10/10s Sugar short (withheld @ Detroit)				
		12,200# @ $5.18		631.96	244.00	387.96
19802	20525	Marshall Field & Co.				
		1-1/2 Dz. Kimonas short from cases	@ $2.16-2/3	3.25		
		5/12 Dz. " Dmg. & Rejected	@ 2.16-2/3	.91		
		2/12 Dz. " " "	@ 1.60	.26		
		1/12 Dz. " " "	@ 2.55	.21	4.63	1.34 3.29
19952	W.B.8.	P. V. Bright & Co.				
		1 Cs. Admiral Sardines short	@ 2.75	2.75		
		2 " " " "	@ 3.40	6.80		
		1 " Blueberries damaged	@ 3.60	3.60		
		2 " Sardines recoopered-labor		1.00		
		4 " Blueberries recoopered-labor		1.00		
		11 Cans " Dmg. & Rejected	@ .60	6.60	21.75	1.50 20.25
20042	20435	Geo. E. Keiser				
		90-100# Bags Fine Burlap Sugar Short (withheld at Detroit)				
		900# @ $5.03		452.70		
		29 Bags Torn—loss 340#	@ $5.03	17.40		
		29 " Sold a/c recoopered	@ .30¢ Disc	8.70	478.80	152.00 326.80

Brought forward:

[fols. 301-302]

G.L.T. Claim	MFST No.	Claimant		Claim	Salvage	Net
20109	20519	American Radiator Co.				
		7 Grate Bars broken @ $13.25	92.75			
		3 Regulator covers " @ .60	1.80			
			94.55			
		Less trade discounts 37-25-10%	40.21			
		Freight 474# @ 23½¢ per cwt	1.11	41.32	1.56	39.76
20589	20427	National Sugar Refining Co.				
		198 Bags 4/25s Sugar short (withheld @ Detroit)				
		19800# @ $4.85 per cwt	960.30			
		46 Bags 20/5s Sugar Short (withheld @ Detroit)				
		4600# @ $4.95 per cwt	227.70			
		61 Bags 10/10s Sugar Short (withheld @ Detroit)				
		6100# @ $4.85 per cwt	295.85			
		30 Bags 10/10 torn lost wgt. 258# @ 4.85	12.51			
		4 Bags 20/5 torn lost wgt. 80# @ 4.95	3.96			
		12 Bags 4/25 torn lost wgt. 84# @ 4.85	4.07			
		42 Bags 10/10 damaged sold @ discount .45¢	18.90			
		4 Bags 20/5 damaged sold @ discount .50¢	2.00			
			1,525.29			
		Freight 31,277# @ 24½¢	76.51	1,601.80	530.00	1,071.80
20216	20518	Worlds Dispensary Med. Ass'n.				
		1 Dz. Patent Medicine short @ $9.00	9.00			
		7/12 " " " broken 9.00	5.25			
		2/3 " " " " 9.00	6.00			
		Cartons to replace those damaged—34 @ 10¢	3.40			
		Labor reconditioning	5.25	28.90	.....	28.90

[fols. 301-302]

G.L.T. Claim	MFST No.	Claimant		Claim	Salvage	Net
20611	20534	Kaempfer's				
		1 Bag Canary Seed short				
		220# @ $3.30 per cwt.		7.26	.....	7.26
20020	20548	American Sugar Refining Co.				
		24 Bbls. Sugar Short (withheld @ Detroit)				
		8400# @ $4.80	403.20			
		20 Bbls. Sugar short (13 Withheld @ Detroit)				
		(7 of these rejected @ Chicago)				
		7000# @ 4.80	336.00			
		5 Sx. 50/2s Sugar Short				
		500# @ 5.05	25.25			
			764.45			
		Freight 16,973# @ 24½¢ per cwt.	41.58	806.03	438.35	367.68
20020	20549	American Sugar Refining Co.				
		44 Bxs. 24/1 Sugar damaged & rejected				
		1056# @ $5.95	62.83			
		74 Bxs. 24/1 Sugar dmg. & rejected				
		1776# @ $5.95	105.67			
		171 Bbls. Sugar short (withheld-Detr.)				
		59850# @ $4.80	2,872.80			
			3,041.30			
		Freight 66,913# @ 24½¢ per cwt.	163.94	3,205.24	1,672.50	1,532.74

Brought forward:

[fols. 303-304]

G.L.T. Claim	MFST No.	Claimant		Claim	Salvage	Net
20139	20526	E. R. Squibb & Son				
		To damage to various boxes of Medicines broken stained & cartons damaged, requiring renewal		114.74	36.26	78.48
19945	3939	Elliott Roll & Wuerttemberger (J. F. Lalla)				
		10 Crtns. String Beans rejected (20 Ds.) @ .67½	$13.50			
		182 Cans String Beans rejected	10.24			
		Freight 650# @ .40¢ per cwt.	2.60	26.34	12.70	13.64
19840	3939	Elliott Roll & Wuerttemberger (Mallot)				
		35 Cs. Tomatoes rejected (70 Ds.) @ .70¢	49.00			
		41 Cans Tomatoes rejected @ .70¢	2.39			
		Freight 1340# @ .40¢	5.36	56.75	23.00	33.75
19840	3938	Elliott Roll & Wuerttemberger (Mid City)				
		91 Cans Tomatoes damaged & rejected				
		91 Cans @ .70¢ per Ds.	5.31			
		Freight 136½# @ .44¢ per cwt.	.61	5.92	4.55	1.37
19590	20434	Geo. E. Keiser				
		184-100# Bags Fine Toweling Sugar Short (Withheld at Detroit)				
		18400# @ $5.03		925.52	308.70	616.82
19591	20436	Geo. E. Keiser				
		1476-100# Bags Fine Toweling Sugar Short (Withheld at Detroit)				
		147,600# @ $5.03		7,424.28	2,824.27	4,600.01
19938	20429	Geo. E. Keiser				
		138-100# Bags Fine Toweling Sugar Short (Withheld at Detroit)				

[fols. 303-304]

G.L.T. Claim	MFST No.	Claimant		Claim	Salvage	Net
		13,800# @ $5.03	694.14			
		218-100# Bags Same Torn with loss of 2766#				
		2766# @ 5.03	139.13			
		218 Bags Sold @ discount of 30¢	65.40	898.67	287.85	610.82
19857	20529	Inland Rubber Co.				
		194 Bales Rubber Damaged and rejected.				
		50,886# @ 7¼		3,689.23	1,892.09	1,797.14
21062	20426	California & Hawaiian Sugar Refining Corp.				
		61-100# Bags Yellow D. Sugar Short (Withheld at Detroit)				
		6100# @ $4.28	261.08			
		164-100# Bags Berry B. Sugar Short (Withheld at Detroit)				
		16,400# @ 5.03	824.92			
		166-100# Bags Golden C. Sugar Short (Withheld at Detroit)				
		16,600# @ 4.43	735.38			
		18-100# Bags 10/10 Berry Sugar Short (Withheld at Detroit)				
		1800# @ 5.18	93.24	1,914.62	575.00	
		26-100# Bags Yellow D. Sugar Wet & Rejected @ $4.28	111.28			
		138-100# Bags Berry B. Wet & Rejected @ $5.03	694.14			
		31-100# Bags Golden C. Wet & Rejected @ $4.43	137.33	942.75	747.22	
				2,857.37	1,322.22	1,535.15
				$37,677.57	$15,699.00	$21,978.57

[fol. 305] Apportionment of Loss Among Underwriters

Policies Written for Term April 15, 1933—December 12, 1933

Clauses: Great Lakes Transit Corp., Special

Claim:	$22,338.57
Deduct as per policy:	1,000.00
Claim (Net):	$21,338.57

Fleet Insurance $1,100,000.00

American Insurance

Policy No.	Company	Insures	Pays
CP-97189	Atlantic Mutual	30%	$6,401.57
13950 L	Home Insurance Co.	10%	2,133.85
4279	Union Marine & General	10%	2,133.86
2461	Sun Insurance Co.	8%	1,707.09
LC-267	Eagle, Star & British Dominions	5%	1,066.93
6669	Fireman's Fund	4%	853.54
ITF-5194	Great American	3%	640.16
		70%	$14,937.00

English Insurance

Policy No.	Company	Insures	Pays	£	s	d
33/DF/195	Lloyd's London	11.435%	$2,440.06			
	Edinburgh Assurance	2.995	639.09			
	British Traders'	2.995	639.09			
	Royal Exchange	2.995	639.09			
	Cornhill	2.995	639.09			
	Sun	2.995	639.09			
	Economic	1.795	383.03			
	London Assurance	1.795	383.03			
		30%	$6,401.57			

Recapitulation

American Insurance Pays	$14,937.00
English Insurance Pays	6,401.57
	$21,338.57

Marsh & McLennan,
Average Adjusters
By: L. Smith.

Buffalo, N. Y.
January 22, 1934

[fol. 306] In United States District Court

Answer of Great Lakes Transit Corporation to the Intervening Petition of Atlantic Mutual Insurance Company, in Cases Nos. 3168 and 3170—Filed June 14, 1934

Great Lakes Transit Corporation, for its answer to the intervening petition of Atlantic Mutual Insurance Company in the above entitled consolidated cause:

1. Admits the allegations contained in the Articles of the said intervening petition numbered "First" and "Second."

2. Denies, upon information and belief, each and every allegation contained in the Article of the intervening petition numbered "Third."

3. Admits that heretofore and on or about the 23rd day of May, 1933, said intervening petitioner insured Great Lakes Transit Corporation under and pursuant to the special form attached to Policy No. CP-97189 of said petitioner, a copy of which special form is a part of Schedule "A" annexed to the said intervening petition, and that similar insurance was carried with and provided by other insurers in the aggregate amount of $1,100,000; but denies, upon information and belief, each and every other allegation contained in the Article of the intervening petition numbered "Fourth."

4. Admits the allegations contained in the Articles of the intervening petition numbered "Fifth" and "Ninth," but alleges that prior to the time said intervening petition was filed hearing had been had and proof taken as to the question of fault for the said collision, and this Court had filed its opinion holding the Dixon and the King mutually at fault, that interlocutory decree has not as yet been entered in accordance with such opinion, and Great Lakes Transit Corporation intends to appeal from said decree and has claimed and still claims that said Steamer Dixon and those in charge of her were not responsible for any negligence or fault causing or contributing to the said collision.

5. Denies, upon information and belief, each and every allegation contained in the Article of the said intervening petition numbered "Sixth," except that said Great Lakes Transit Corporation admits the amount of damage and loss [fol. 307] by reason of said collision to all of said cargo has not as yet been definitely determined, but as nearly as can now be ascertained the amount thereof will approximate $30,000.00. Great Lakes Transit Corporation further admits that the sum of $6,401.57 has been heretofore paid to it by said petitioner, but alleges that the said amount

was paid to Great Lakes Transit Corporation for its own account in the manner and under the circumstances hereinafter alleged, and not otherwise.

6. Admits the allegations contained in Article "Seventh" of the said intervening petition, except that it denies, upon information and belief, that the payments by intervening petitioner referred to in said petition have been or will be made in the manner or for the purposes therein alleged, and alleges that such payments have been and will be made in the manner and for the purposes hereinafter alleged, and not otherwise.

7. Denies, upon information and belief, each and every allegation contained in the Article of the intervening petition numbered "Eighth."

8. Denies that all and singular the premises set forth in said intervening petition are true, but admits the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Further answering said intervening petition, Great Lakes Transit Corporation alleges, upon information and belief, as follows:

9. The cargo of the Dixon referred to in said intervening petition was shipped upon said vessel and was being transported by the Great Lakes Transit Corporation at the time of such collision, under and pursuant to the provisions of bills of lading issued by Great Lakes Transit Corporation and accepted by the several shippers and owners of cargo, and under and pursuant to tariff provisions duly filed by said Great Lakes Transit Corporation as a common carrier, with the Interstate Commerce Commission, and being in full force and effect and forming a part of the provisions of said bills of lading by reference. By and under such bill of lading and applicable tariff provisions, Great Lakes Transit Corporation intended to and did assume liability for all loss or damage to said cargo, including General Average charges and expenses for which the cargo owner [fol. 308] might under the maritime law be chargeable, caused by or resulting from collision or other perils of the sea. Reference is hereby made to the said bills of lading and tariffs, the originals or true copies of which will be in-

troduced in evidence at the hearing upon the intervening petition, for a full statement of the provisions, terms and conditions thereof. The Great Lakes Transit Corporation has thereby become liable to pay all losses sustained by the shippers and owners of cargo laden on board the Dixon as the result of the collision involved in this proceeding. In due and ordinary course, some of the shippers and owners of cargo lost or damaged as a result of said collision, have heretofore made claims therefor against Great Lakes Transit Corporation, and further similar claims will hereafter be presented to Great Lakes Transit Corporation for additional large amounts on account of such loss and damage. Great Lakes Transit Corporation has heretofore approved and paid such cargo claims in the amount of at least $22,338.57, and will hereafter be called upon and compelled to pay and will pay additional large amounts to shippers and cargo owners on account of claims heretofore made or which may hereafter be made against it.

10. The policies of insurance of Atlantic Mutual Insurance Company and other policies of insurance mentioned in said intervening petition were intended to and did insure and indemnify Great Lakes Transit Corporation against the liability assumed by it as aforesaid to shippers and owners of cargo for loss or damage, including General Average and expenses, resulting from collision and from perils of the sea. In due and ordinary course and according to established custom and practice a partial adjustment of such of the claims of shippers and cargo owners as had been approved and paid by Great Lakes Transit Corporation up to January 22, 1934, was prepared in the usual form by Marsh & McLennan, Average Adjusters, in the amount of $21,338.57, being the said amount of $22,338.57 heretofore paid by Great Lakes Transit Corporation to owners of cargo, less the deductible average of $1000.00 provided in said policies, and claim for reimbursement of said amount was made on behalf of Great Lakes Transit Corporation to Atlantic Mutual Insurance Company and other underwriters mentioned in said intervening petition. On or about the 27th day of January, 1934, said Atlantic Mutual Insurance Company paid its proper proportion, to wit, thirty per cent [fol. 309] or $6,401.57, of the said amount of $21,338.57, and the other underwriters mentioned in the intervening peti-

tion have also heretofore paid their proper proportions thereof. As and when the total amount of all loss and damage to cargo has been definitely ascertained and all such claims have been finally approved and paid by the Great Lakes Transit Corporation, a final adjustment will be similarly prepared and presented to said Atlantic Mutual Insurance Company and other underwriters, for reimbursement, and in the meantime one or more additional partial adjustments and statements may also be presented, all in due and ordinary course and according to established custom and practice. The said intervening petitioner has not and will not have any rights whatever in this proceeding, except such as it has derived or may derive from or through Great Lakes Transit Corporation on account of payments made under its agreement to insure and indemnify Great Lakes Transit Corporation against liability as aforesaid, and is not entitled to any rights of subrogation against said Great Lakes Transit Corporation or to the granting of any relief or the entry of any form of decree which will in any way interfere with the rights and interests of its assured, the said Great Lakes Transit Corporation, or affect the legal liability of the said intervening petitioner under the said policy of insurance.

11. Great Lakes Transit Corporation does not waive its rights to appeal from the finding of the Court that the Dixon was partly at fault for the said collision, but if at any time or at any stage of this cause an interlocutory or final decree be entered pursuant to or based upon a holding that the Dixon and the King were mutually at fault for the said collision, such decree, by reason of the premises and under the actual facts of the case, should direct that all damages, including damage to the cargo of the Dixon, be equally divided, and such cargo damage for which Great Lakes Transit Corporation has become liable to pay and has paid or will hereafter pay should in all respects be treated as a loss sustained by it on its own account as a result of the collision; and under such circumstances an award to intervening underwriters against the King and/or her owner for the full amount of loss or damage to the cargo of the Dixon and/or for the full recovery of the payments made by the said intervening underwriters or any of them would be contrary to and inconsistent with

[fol. 310] the ultimate legal rights and liabilities of all parties to this litigation, and prejudicial to the rights of Great Lakes Transit Corporation under its said policies of insurance.

Wherefore, said Great Lakes Transit Corporation prays that the said intervening petition be dismissed with costs, or in the alternative that if said petitioner be permitted to intervene in this proceeding, such conditions be imposed as will protect said Great Lakes Transit Corporation from prejudice and interfere with its lawful rights and interests, and permit the entry of interlocutory and final decree in accordance with the ultimate legal rights of all parties, and that said Great Lakes Transit Corporation may have such other and further relief in the premises as it may be justly entitled to receive.

Great Lakes Transit Corporation, by David S. Jackson, One of Its Proctors. Brown, Ely & Richards, Proctors for Great Lakes Transit Corporation, Office & P. O. Address: 1317 Chamber of Commerce Bldg., Buffalo, N. Y.

Duly sworn to by W. R. Evans. Jurat omitted in printing.

[fol. 311] IN UNITED STATES DISTRICT COURT

ANSWER OF INTERSTATE STEAMSHIP COMPANY TO THE INTERVENING PETITION OF ATLANTIC MUTUAL INSURANCE COMPANY, IN CASES NOS. 3168 AND 3170—Filed June 26, 1934

Now comes Interstate Steamship Company, libelant in cause No. 3168, and claimant to the steamer Willis L. King, her engines, boilers, etc., and also respondent, in cause No. 3170, and files this its answer to the intervening petition of Atlantic Mutual Insurance Company filed in the above entitled consolidated cause, and says:

1. Admits the allegations contained in Article "First" of the intervening petition, and as to Article "Second" of the petition admits that at the time mentioned in said Article, the steamer- George D. Dixon and Willis L. King were in collision in the St. Clair River, by reason of which colli-

sion the steamer Dixon sustained some damage, but as to the allegation that the further voyage of the Dixon was frustrated and that much of the cargo laden thereon was damaged, wet and lost, said Interstate Steamship Company does not have information as to such allegations (except as stated in paragraph 2 of this answer) and, therefore, denies the same and asks for proof thereof.

2. Respecting the allegations of Articles "Third" and "Fourth" of said intervening petition, said Interstate Steamship Company alleges that it is without information as to the same except that on June 15th there was filed in this cause a stipulation as to forms of bills of lading and tariffs, under which cargo was shipped and was being carried on the steamer George D. Dixon, and also as to insurance relating to said cargo, and relying upon representations made by counsel for the steamer George D. Dixon and of counsel representing underwriters claiming to have issued policies respecting the cargo, said stipulation before being filed was executed by counsel for Interstate Steamship Company. One provision of the stipulation (paragraph 8) is that it was entered into for the purpose of permitting the court to pass upon the legal rights of underwriters claiming to have written insurance covering cargo in so far as the same concerns the form of interlocutory decree to be entered and a provision in said paragraph 8 [fol. 312] of the stipulation is that the stipulation should be without prejudice to the right of any party to introduce or offer further evidence, prior to the entry of final decree, that might be deemed material to any question or issue in connection with the said intervening petition of Atlantic Mutual Insurance Company with respect to cargo. Accordingly, said Interstate Steamship Company now denies the allegations of Articles "Third" and "Fourth" of said intervening petition and reserves the right to make or require proof, as it may be advised, respecting the allegations of said Articles "Third" and "Fourth" of the intervening petition.

3. Respecting allegations of Articles "Fifth" and "Ninth" of said intervening petition, Interstate Steamship Company admits that libel was filed with allegations as stated in said Article "Fifth," and as to said Article "Ninth" the Interstate Steamship Company denies that the

collision between the steamer- George D. Dixon and Willis L. King was caused by any fault and negligence of the steamer Willis L. King or of those in charge of her, or by any fault or negligence of said Interstate Steamship Company, and avers that said collision was due solely to the faults of the steamer George D. Dixon and those in charge of her navigation in the manner and in the respects set up by Interstate Steamship Company in the libel in cause No. 3168 and in the answer in cause No. 3170, both of which are now on file in this consolidated cause and to which reference is hereby made, the allegations of said libel in No. 3168 and of the answer in No. 3170 being here incorporated by reference. Interstate Steamship Company alleges that prior to the filing of said intervening petition there had been a trial before this Honorable Court on the issues raised by the pleadings as to the question of fault between the Steamers Dixon and King respecting said collision; that full proof was taken before the Court on that issue and thereafter and before the filing of the intervening petition, this Court filed a written opinion holding the Dixon and the King mutually at fault and that the damages should be divided accordingly, costs to be borne equally by Interstate Steamship Company and Great Lakes Transit Corporation. And the Court further ordered that the matter should be referred to a Master Commissioner to determine and assess the damages and make report to the Court.

[fol. 313] 4. Respecting the allegations of Articles "Sixth," Seventh" and "Eighth" of the intervening petition, Interstate Steamship Company alleges that it is without information respecting said allegations, but states, as mentioned in Article 2 of this answer, that a stipulation has been executed and filed for the purposes stated in said Article 2, to which said Article 2 reference is hereby made, but said Interstate Steamship Company did not intend by the signing of said stipulation to admit, and does not now admit, that cargo being carried on the Dixon was damaged to the extent named in said intervening petition, nor is admission made that cargo underwriters have paid the amounts named in the intervening petition or in the stipulation, and said Interstate Steamship Company denies the allegations of the "Sixth," "Seventh" and "Eighth" Articles of said intervening petition, and full proof, before the Commissioner on damages, or otherwise, is demanded re-

specting all such damage and payments, and all matters mentioned in said Article "Sixth," "Seventh" and "Eighth" of the intervening petition, in the event such allegations become material.

5. Respecting the allegations of the "Tenth" Article of the intervening petition, Interstate Steamship Company denies that all and singular the premises set forth in the intervening petition are true, but admits the jurisdiction of the United States and of this Honorable Court.

Wherefore, said Interstate Steamship Company prays the Court that the issues so arising on the petition of said Atlantic Mutual Insurance Company between cargo underwriters and the owner of the Dixon may be determined, but that the rights of Interstate Steamship Company be preserved so that, both as to the form of Interlocutory Decree and on determination of damages, the same may be assessed and final decree entered according to the Court's ruling that the Steamers Willis L. King and George D. Dixon were mutually at fault and that therefore, the damages and costs be equally divided between the owners of said steamers, except that as to costs due to controversies arising between the owner of the Dixon and her cargo underwriters, no part thereof to be assessed against the King and/or her owner. And said Interstate Steamship Company asks for any and [fol. 314] all other and further relief to which it may be entitled in the premises.

Duncan, Leckie, McCreary, Schlitz & Hinslea, Proctors for Interstate Steamship Company.

Duly sworn to by Frederick L. Leckie. Jurat omitted in printing.

[fol. 315] IN UNITED STATES DISTRICT COURT

OPINION AND DECISION OF THE COURT, ON SETTLEMENT OF INTERLOCUTORY DECREE, IN CASES NOS. 3168 AND 3170—Filed July 9, 1934

WEST, J.:

Because an innocent cargo owner may look for its damages to either of two colliding vessels in fault, as well as

to both, the underwriters claim that in enforcing their rights of subrogation they should be permitted a decree that will require the non-carrying vessel, the King, to pay all cargo loss in the first instance. But when the case was heard, both vessels had been charged with fault, the charges were sustained, and as a result the decree, under the decisions cited in the briefs, must be in favor of the owner of the Dixon as bailee and trustee for cargo owners, and run against such owner, The Great Lakes Transit Corp. individually, and against the owner of the King for a moiety of the damages against each, with the usual provision for recovery from either for any deficiency not collectible from the other.

This being the actual situation, I can see no reason for allowing the underwriters to now assert a right of cargo owners which might exist under some circumstances but not under the pleadings and the facts in this case. I refer, of course, to the right to compel full payment to be made by the King. Subrogation should depend upon actualities and not theories. Here the underwriters have paid and will pay the amount of cargo loss into the hands of the owner of the Dixon as bailee and trustee for cargo owners, and also as the common carrier liable under the bills of lading for such losses. The underwriters are entitled to be subrogated to all rights of those for whose benefit these payments were and will be made, but in this case that does not include the right of any owner of cargo to have full payment from the King, the effect of the court's decision being that due to the fault of both vessels, no such right existed. The underwriters are entitled to enforce the liability of the King and that of the Dixon each for a moiety of the cargo losses. When that is done they will have their outlays back and the owners of the vessels will have paid out what is required by the law in view of the finding of mutual fault. [fol. 316] The case of Erie R. R. Co. v. Erie Transportation Co., 204 U. S. 220, strongly relied on by the underwriters, is so different in its facts that I think it has little if any application. See The New York, 108 Fed. 102, 105 (C. C. A. 6).

The court will sign the decree presented by proctors for the owners of the Dixon.

S. H. West, Judge.

July 9, 1934.

IN UNITED STATES DISTRICT COURT

LETTER, DATED JULY 10, 1934, FROM S. H. WEST, JUDGE, TO MESSRS. STANLEY & GIDLEY AND TO MESSRS. BROWN, ELY & RICHARDS, RE OPINION—Filed —— —, 1934

Cases Nos. 3168 and 3170

(Copy)

Cleveland, O., July 10, 1934.

Messrs. Stanley & Gidley, Marine Trust Co. Bldg., Buffalo, N. Y.; Brown, Ely & Richards, 1317 Chamber of Commerce Bldg., Buffalo, N. Y.

Interstate SS. Co. v. Great Lakes Transit Corp.

GENTLEMEN:

I filed an opinion yesterday with which I am satisfied save that it should have expressed the court's view that this insurance was paid for by and was primarily for the benefit of cargo owners.

[fol. 317] Mr. Garry has just called my attention to the inconsistency between the decree presented by Mr. Richards and the opinion; and I now return both forms of decree with the request that one be prepared satisfactory in form to Messrs. Stanley and Richards and in conformity to the opinion, and send to me. It may contain the provision that under the contracts of carriage the Transit Corp. assumed liability for all losses to cargo regardless of fault. I am unwilling to have a finding against the King for the full damages sustained by Milko. The decree should express the court's view herein indicated as to the beneficial interest of the cargo in the insurance.

Mr. Garry has questioned the propriety of staying all proceedings before the master except with respect to Milko in case of appeal. I have nothing to suggest about that; perhaps you gentlemen can agree.

I strike out the last sentence of the opinion.

Very truly yours, S. H. West, U. S. Dist. Judge.

Copy to Thos. H. Garry, Esq., Cleveland, O.

IN UNITED STATES DISTRICT COURT

SUPPLEMENTAL OPINION AND DECISION OF DISTRICT COURT ON SETTLEMENT OF INTERLOCUTORY DECREE—Filed July 27, 1934

Cases Nos. 3168 and 3170

WEST, J.:

After considering Mr. Richards' brief in the form of a letter of the 24th inst., with the authorities cited, the court is still of opinion that the cargo owners are the real beneficiaries of this insurance.

The Great Lakes Transit Corp. assumed to the shippers an obligation to provide marine insurance on their [fol. 318] cargo, and also assumed the common law obligation of a carrier to carry safely. The policies in question covered the carrier's legal liability resulting from a breach of either of the foregoing obligations or both, and while the cargo owners or shippers probably lacked any insurable interest in the carrier's legal liability for a direct loss of their goods due to collision, they did have such interest respecting the legal liability of the carrier arising from failure to procure marine insurance on their goods. Therefore, and having also in view the fact that the shippers pay the insurance premiums, they are the beneficiaries of the policies, in so far as this latter liability is concerned, though having no insurable interest in any other subject-matter covered by the insurance. Lowery v. Connecticut Fire Ins. Co., 70 F. (2d) 324, which expresses the rule regarding necessary insurable interest.

The policies here involved recognize and cover the foregoing differing legal liabilities of the carrier. The language "on the assured's liability to others in respect to cargo" is probably sufficient, for failure to procure marine insurance on cargo as required by tariff would seem to be "in respect to" cargo. But there is further language of the policy stating the nature of the carrier's risks and liabilities in which insurance of cargo is especially mentioned, and indemnity is granted the assured for all risks to the extent of its liability to the owners.

It was proper and might have been very important for the shippers to have the protection of marine insurance as well as that of a carrier's common law liability. In ef-

fect this would give them two funds to which they might look. And the underwriters having furnished indemnity for both classes of liability, were interested to have the proceeds of the policies so applied as to preserve all their subrogation rights. When the loss occurred the rights of all the parties became fixed and were not affected by the payment by the carrier of the losses out of its own moneys on the theory that it could thus deal with the liability as one for loss of cargo and deny the underwriter's subrogation. This would allow the carrier to profit by its own wrong, failure to fulfill its obligation under its tariff to furnish marine insurance on the cargo. In brief, as to legal liability for direct loss of cargo, the owners had no insurable interest, and the policy was for the sole benefit of the carrier. If nothing else were involved, the doctrine of [fol. 319] the Wager case, 150 U. S. 99, would apply. As to liability for failure to procure insurance, which liability, I think, is within the coverage and the very broad language employed in the policies, the carrier was only the nominal assured, the owners were the real beneficiaries under the "whom it may concern" clause, and the above doctrine has no application.

The decree furnished by the underwriters will be signed, with the changes necessary to conform it to this opinion.

S. H. West, Judge.

July 27, 1934.

In United States District Court

Interlocutory Decree, in Cases Nos. 3168 and 3170—Filed July 27, 1934

These causes having duly come on to be heard on the libel of Interstate Steamship Company against Great Lakes Transit Corporation (Admiralty No. 3168), and on the libel of Great Lakes Transit Corporation as owner of the Steamer George D. Dixon and as carrier and/or bailee of her cargo, against the Steamer Willis L. King, her engines, etc., and Interstate Steamship Company (Admiralty No. 3170), in which last numbered cause John Milko filed an intervening libel against the Steamer Willis L. King, her engines, etc., and Great Lakes Transit Corporation was impleaded by petitions filed by Interstate Steamship Com-

pany under Admiralty Rule 56 as respondent, to answer the libels on behalf of cargo and of John Milko; and all the causes having been consolidated before trial; and the case [fol. 320] having been heard on the said libels, answers and petitions of the parties, and upon the proofs in support thereof; and having been duly argued by the respective advocates and due deliberation having been had; and the Court on March 29, 1934, having filed its opinion in writing in which it found both vessels, to-wit: the Steamer Willis L. King and the Steamer George D. Dixon at fault, and divided the damages between said vessels and their owners accordingly, costs to be borne equally by the owners Interstate Steamship Company and Great Lakes Transit Corporation; and libelant Great Lakes Transit Corporation having filed a petition for reargument herein, and due deliberation having been had thereon, and the Court on May 7, 1934, having filed its further decision denying such reargument; and a petition of intervention having been thereafter filed herein by Atlantic Mutual Insurance Company, a corporation, intervening herein for its interest as one of the insurers and underwriters of the cargo laden on board the Steamer George D. Dixon against the Steamer Willis L. King, her engines, etc., and against Interstate Steamship Company, respondent herein; and answer of Great Lakes Transit Corporation to said intervening petition having been filed; and a stipulation dated May 27, 1934, having been thereupon filed, stipulating that such intervening petition stand and serve herein as the intervening petition of the certain other therein named insurers and underwriters of cargo laden on board the Steamer George D. Dixon therein named who are similarly situated, together with a stipulation to the effect that the interests of such other similarly situated insurers and underwriters of cargo laden on board the Steamer George D. Dixon may be governed by the determination with respect to the rights of said Atlantic Mutual Insurance Company, and a further stipulation dated June 13, 1934, having been filed, stipulating into evidence certain documents therein referred to, together with certain facts in said stipulation set forth, for the purpose of permitting the Court to pass upon the legal rights of the Atlantic Mutual Insurance Company and other similarly situated underwriters and insurers of cargo laden on board the Steamer George D.

Dixon; and such issues having come on for hearing and argument and having been heard by the Court upon all pleadings and proceedings heretofore had and taken herein, and upon said intervening petition, answer and stipulations; and due deliberation having been had, and the [fol. 321] Court having filed its further opinion in writing dated July 9, 1934, in which it determined that decree herein run against the owner of the Steamer George D. Dixon individually, and the owner of the Steamer Willis L. King for a moiety of the damages sustained by cargo laden on board the Steamer George D. Dixon against each, with the usual provision for recovery from either for any deficiency not collectible from the other, and having further determined that under the contracts of carriage the Great Lakes Transit Corporation, owner of the Steamer George D. Dixon, assumed liability for all loss or damage to and for failure to procure marine insurance on cargo laden on board said vessel regardless of fault, and that the policies of insurance issued by the intervening petitioners herein were paid for by and in respect to securing cargo insurance were primarily issued for the benefit of owners, shippers and consignees of cargo laden on board the Steamer George D. Dixon, and that said intervening petitioners, by reason of payments heretofore made and to be made on account of such cargo loss and damage, are entitled to be subrogated to the rights of such owners, shippers and consignees of cargo laden on board the Steamer George D. Dixon for the recovery of full indemnity thereon, and are entitled to enforce the liability of the Steamer Willis L. King and of the Steamer George D. Dixon each for a moiety of the cargo loss and damage, so to thereby provide full recompense to said intervening petitioners for the amounts paid and to be paid by them; and the parties having agreed to a reference for the assessment of damages, it is hereby

Ordered, Adjudged and Decred that said vessels Willis L. King and George D. Dixon be, and they hereby are, both held at fault for the collision set forth in said pleadings, and all resulting damages are hereby divided equally between their respective owners, the Interstate Steamship Company and Great Lakes Transit Corporation, all costs to be borne equally between said parties; and it is hereby further

Ordered, Adjudged and Decreed that under and by reason of the various contracts of carriage between Great Lakes Transit Corporation and shippers, owners and consignees of cargo laden on board the Steamer George D. Dixon, Great Lakes Transit Corporation assumed and became liable to pay for all losses and damages sustained by [fol. 322] and in respect of such cargo, including general average charges and expenses of a similar nature, resulting from said collision, such liability being regardless of fault or negligence on the part of or attributable to Great Lakes Transit Corporation; that Atlantic Mutual Insurance Company and other similarly situated underwriters intervening herein, issued similar policies of insurance aggregating the sum of $1,100,000.00, at the request of said Great Lakes Transit Corporation, which said policies of insurance were paid for by and were primarily for the benefit of and to indemnify owners, shippers and consignees of cargo laden upon the Steamer George D. Dixon and upon other vessels owned and operated by Great Lakes Transit Corporation against loss or damage sustained by such cargo while water-borne on said vessels of Great Lakes Transit Corporation; that to the extent of payments heretofore made by said Atlantic Mutual Insurance Company and other similarly situated underwriters, or made by said intervening underwriters at any time prior to entry of final decree, in settlement and payment of proper claims of owners, shippers and consignees of cargo laden on board the Steamer George D. Dixon on account of loss or damage to such cargo arising out of said collision, and on account of general average charges and expenses of a similar nature, said Atlantic Mutual Insurance Company and other similarly situated intervening underwriters are entitled to be, and are, subrogated to all rights of owners, shippers and consignees of cargo laden on board the Steamer George D. Dixon for loss or damage to such cargo arising out of said collision; and it is hereby further

Ordered, Adjudged and Decreed that Atlantic Mutual Insurance Company and other similarly situated underwriters intervening herein recover a moiety of the amount of payments made and to be made prior to entry of final decree herein for the benefit of owners, shippers and consignees of cargo laden on board the Steamer George D. Dixon of and from the Steamer Willis L. King, her engines,

etc., and her owner Interstate Steamship Company, and a moiety thereof of and from the Steamer George D. Dixon, her engines, etc., and her owner Great Lakes Transit Corporation, with costs, and that any balance which said intervenors shall not be able to collect from or enforce against either of said vessels be paid by the other vessel to [fol. 323] the amount of its stipulation for value, and that said vessels and their stipulators be condemned therefor; and it is hereby further

Ordered, Adjudged and Decreed that with respect to any balance of damages sustained by owners, shippers and consignees of cargo laden on board the Steamer George D. Dixon at the time of said collision, and resulting therefrom, not paid by Atlantic Mutual Insurance Company and other similarly situated underwriters intervening herein, at the time of entry of final decree herein, if there be such balance, the Great Lakes Transit Corporation as bailee and trustee for such cargo owners, shippers and consignees, shall recover a moiety of such balance of and from the Steamer Willis L. King, her engines, etc., and her owner Interstate Steamship Company, and a moiety of any such balance of and from the Steamer George D. Dixon, her engines, etc., and her owner Great Lakes Transit Corporation, individually and that any balance which such bailee shall not be able to collect from or enforce against either of said vessels be paid by the other vessel to the amount of its stipulation for value, and that said vessels and their stipulators be condemned therefor; and it is hereby further

Ordered, Adjudged and Decreed that intervening libelant, John Milko recover a moiety of the damages set forth in his intervening libel of and from the Steamer Willis L. King, her engines, etc., and her owner Interstate Steamship Company, and a moiety thereof of and from the Steamer George D. Dixon, her engines, etc., and her owner Great Lakes Transit Corporation individually, and that any balance which such intervening libelant shall not be able to collect from or enforce against either of said vessels be paid by the other vessel to the amount of its stipulation for value, and that said vessels and their stipulators be condemned therefor; and it is hereby further

Ordered, Adjudged and Decreed that the consolidated cause be referred to J. M. Shallenberger, Esq., of Cleveland, Ohio, as Special Master Commissioner, to determine and

report to the Court with all convenient speed, the amount of damages sustained by reason of said collision, including the amount of loss or damage sustained by cargo laden on board the Steamer George D. Dixon, and the amount of cargo's proportion of general average charges and ex-
[fol. 324] penses of a similar nature, and the amount paid and to be paid by Atlantic Mutual Insurance Company and other similarly situated intervening insurers and underwriters of cargo on account of such cargo loss and damage of cargo's proportion of general average charges and expenses, and also damages due to personal injuries suffered by John Milko, intervenor, provided, however, that in case an appeal be taken from this decree by any party within ten (10) days after entry and service thereof, all proceedings before the said Special Master Commissioner with respect to damages, except those with respect to damages of the said John Milko, shall be stayed until final determination of such appeal.

The parties having agreed thereto, it is

Ordered that the Court's opinions filed herein shall stand as the special findings of fact and conclusions of law required under Admiralty Rule 46½.

S. H. West, U. S. D. J.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL, PROOF OF SERVICE, AND WAIVER OF CITATION, IN CASES NOS. 3168 AND 3170—Filed August 8, 1934

SIRS:

Please take notice that Great Lakes Transit Corporation, libellant, respondent and impleaded respondent in the above-entitled consolidated causes, hereby appeals to the United States Circuit Court of Appeals for the Sixth Cir-
[fol. 325] cuit from the interlocutory decree entered herein on the 27th day of July, 1934, and from each and every part of said decree.

Dated August 6, 1934.

Yours, etc., Brown, Ely & Richards, 1317 Chamber of Commerce Bldg., Buffalo, N. Y., Proctors for Great Lakes Transit Corporation.

To F. J. Denzler, Clerk of the Court; Duncan, Leckie, McCreary, Schlitz & Hinslea, Proctors for Interstate Steamship Company and Steamer "Willis L. King"; Sanders, Hamilton, Dudley & Connelly, Proctors for Intervening Libellant, John Milko; Stanley & Gidley and Robinson & Bleecker, Proctors for Atlantic Mutual Insurance Company and other intervening underwriters.

Waiver and Appearance

Due service of a copy of the foregoing notice of appeal is hereby acknowledged, together with a copy of assignment of errors. The issuance and service of a citation is hereby waived, and acceptance and appearance hereby entered.

Dated this 7th day of August, 1934.

Duncan, Leckie, McCreary, Schlitz & Hinslea, Proctors for Interstate Steamship Company and Steamer "Willis L. King"; Sanders, Hamilton, Dudley & Connelly, Proctors for Intervening Libellant, John Milko; Stanley & Gidley, Proctors for Atlantic Mutual Insurance Company and other Intervening Underwriters.

[fol. 326] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL, IN CASES NOS. 3168 AND 3170—Filed August 8, 1934

Now comes Great Lakes Transit Corporation, named in the above entitled consolidated causes as libellant, respondent and impleaded respondent, and feeling itself aggrieved by the interlocutory decree herein entered on July 27, 1934 finding that the collision and the damage referred to in the pleadings and proof were occasioned by the mutual fault of the vessels Willis L. King and George D. Dixon, decreeing that such damages be equally divided between Interstate Steamship Company and Great Lakes Transit Corporation, and further decreeing that Atlantic Mutual Insurance Company and other similarly situated underwriters issued policies of insurance which were primarily for the benefit of and to indemnify owners, shippers and consignees of cargo laden upon the said Steamer George D. Dixon, that to the extent of payments made by said Atlantic Mutual Insurance

Company and other similarly situated underwriters in settlement and payment of proper claims of owners, shippers and consignees of cargo laden on board the Steamer George D. Dixon on account of loss or damage to such cargo arising out of said collision and on account of general average charges and expenses of a similar nature, said Atlantic Mutual Insurance Company and other similarly situated intervening underwriters are entitled to be and are subrogated to all rights of such owners, shippers and consignees of cargo for loss or damage to such cargo arising out of said collision, and further decreeing that said Atlantic Mutual Insurance Company recover a moiety of such payments from the Steamer Willis L. King and owner, the Interstate Steamship Company, and the other moiety thereof from the Steamer George D. Dixon and owner, the Great Lakes Transit Corporation, with costs, and that any balance which said intervenors shall not be able to collect from or enforce against either of said vessels be paid by the other vessel to the amount of its stipulation for value, and that said vessels and their stipulators be condemned therefor, and further decreeing that in respect to any balance of damages so sustained by owners, shippers and consignees of cargo laden on board the said Steamer George D. Dixon not paid by Atlantic Mutual Insurance Company and other similarly [fol. 327] situated underwriters, Great Lakes Transit Corporation as bailee and trustee of such cargo owners, shippers and consignees, recover a moiety of such balance of and from the Steamer Willis L. King and her owner, Interstate Steamship Company, and the moiety of any such balance of and from the Steamer George D. Dixon and her owner, Great Lakes Transit Corporation, and that any balance which such bailee shall not be able to collect from or enforce against either of said vessels be paid by the other vessel to the amount of its stipulation for value, and further decreeing that intervening libellant, John Milko, recover a moiety of the damages set forth in his intervening libel of and from the Steamer Willis L. King and her owner, Interstate Steamship Company, and a moiety of and from the Steamer George D. Dixon and her owner, Great Lakes Transit Corporation, and any balance which such intervening libellant shall not be able to collect from or enforce against either of said vessels be paid by the other vessel to the amount of its stipulation for value, and further decree-

ing that the consolidated cause be referred to J. M. Shallenberger, Esq., of Cleveland, Ohio, as Special Master Commissioner to determine and report to the Court the amount of damages sustained by reason of said collision.

Said Great Lakes Transit Corporation does hereby claim an appeal from said interlocutory decree and each and every part thereof, to the United States Circuit Court of Appeals for the Sixth Circuit, and prays that said appeal may be allowed, and does hereby present its assignment of errors and prays that the above entitled consolidated causes may be certified to the said Circuit Court of Appeals for the Sixth Circuit, and that this Court may fix the amount of bond to be given by said appellant on appeal.

Great Lakes Transit Corporation, by Brown, Ely & Richards, Its Proctors.

[fol. 328] In United States District Court

Assignments of Error, in Cases Nos. 3168 and 3170—Filed August 8, 1930

Now comes Great Lakes Transit Corporation, named hereinabove as Respondent, Libellant and Impleaded Respondent, by its proctors Brown, Ely & Richards, and says, that in the record and proceedings in the above-entitled consolidated causes, the District Court, in its opinions, decisions, and in its interlocutory decree entered herein on or about the 27th day of July, 1934, erred:

First. In holding that the Steamer "George D. Dixon" was at fault for the collision between the Steamer "Willis L. King" and the Steamer "George D. Dixon," referred to in the pleadings and proofs herein.

Second. In failing to hold the Steamer Willis L. King solely at fault for the collision between the Steamer Willis L. King and the Steamer George D. Dixon, referred to in the pleadings and proofs herein.

Third. In that it ordered, adjudged and decreed that the vessels Willis L. King and George D. Dixon be both held at fault for the collision set forth in the pleadings herein, and that all resulting damages be divided equally between their respective owners, the Interstate Steamship Company and

Great Lakes Transit Corporation, with all costs to be borne equally between said parties.

Fourth. In failing to hold and decree that the Steamer George D. Dixon and Great Lakes Transit Corporation were free from fault for the collision referred to in the pleadings and proofs herein.

Fifth. In holding that the Steamer Dixon was negligent and at fault for porting her helm further after the second one-blast passing signal was sounded by the Steamer Willis L. King.

Sixth. In holding that upon hearing the second one-blast passing signal blown by the Steamer King, Captain Goodberry, master of the Steamer George D. Dixon, "should have appreciated that the approaching vessel was being very badly navigated or was laboring under some serious misunderstanding and that there was risk of collision unless the Dixon took prompt steps to prevent it."

[fol. 329] Seventh. In holding that upon the second one-blast passing signal from the Steamer Willis L. King, the master of the Steamer George D. Dixon should have sounded alarms and stopped her headway.

Eighth. In holding that if the George D. Dixon had sounded alarms and stopped her headway upon hearing the second one-blast passing signal from the Steamer Willis L. King, the collision would have been averted.

Ninth. In failing to hold that the repetition of the one-blast passing signals by the Steamer Willis L. King left no room for doubt as to the course and intention of the Steamer Willis L. King, and that it was the obligation and duty of the Steamer George D. Dixon to continue her course to starboard under a port helm.

Tenth. In holding the Steamer George D. Dixon at fault for continuing her course to starboard under a further port helm on the second one-blast passing signal from the "King," when in fact there was no doubt in the mind of the master of the Steamer George D. Dixon as to the course or intention of the Steamer Willis L. King.

Eleventh. In failing to hold that the Steamer George D. Dixon was navigated in compliance with the laws and rules

enacted and adopted for the prevention of collisions upon the Great Lakes.

Twelfth. In failing to hold that the navigation of the Steamer Willis L. King was so reckless and her faults so gross and inescapable that a presumption adverse to claim or claims of fault on the part of the George D. Dixon arose, so that any reasonable doubts as to the propriety of the navigation of the Steamer George D. Dixon should be resolved in her favor.

Thirteenth. In failing to hold and decree that the libel of Interstate Steamship Company against Great Lakes Transit Corporation should be dismissed with costs.

Fourteenth. In failing to hold and decree that the petition of Interstate Steamship Company under the 56th Admiralty Rule, to bring in Great Lakes Transit Corporation, owner of the Steamer George D. Dixon, as carrier and/or bailee of cargo, to answer cargo claim should be dismissed.

Fifteenth. In failing to hold and decree that petition of Interstate Steamship Company, under Rule 56 of the Supreme Court, to bring in the Great Lakes Transit Corpora- [fol. 330] tion to answer the intervening libel of John Milko, should be dismissed.

Sixteenth. In that it ordered, adjudged and decreed that Intervening Libellant John Milko recover a moiety of his damages of and from the Steamer George D. Dixon, her engines, etc., and her owner Great Lakes Transit Corporation, individually.

Seventeenth. In failing to hold and decree that the Intervening Libellant John Milko recover his damages solely from the Steamer Willis L. King, her engines, etc., and her owner, Interstate Steamship Company.

Eighteenth. In failing to hold and decree that Great Lakes Transit Corporation as owner of the Steamer George D. Dixon, recover all of the damages sustained by it on account of and arising out of the collision between the Steamer George D. Dixon and the Steamer Willis L. King, referred to in the pleadings and proofs, from the Steamer Willis L. King, her engines, etc., and Respondent Interstate Steamship Company, her owner.

Nineteenth. In holding that the interlocutory decree must be in favor of the owner of the Steamer George D. Dixon as bailee and trustee for cargo owners, and run against Great Lakes Transit Corporation individually and against the owner of the Steamer Willis L. King for a moiety of the damages against each; and in failing in connection therewith, to consider and give effect to payments to cargo owners made and to be made by Great Lakes Transit Corporation from its own funds, in settlement of claims of cargo owners made against it and in extinguishment of rights and interests of such cargo owners.

Twentieth. In holding that intervening underwriters have paid and will pay the amount of cargo loss to Great Lakes Transit Corporation as bailee and trustee for cargo owners.

Twenty-first. In holding intervening underwriters are entitled to be subrogated to rights of such owners of cargo, as against Great Lakes Transit Corporation.

Twenty-second. In holding intervening underwriters are entitled to enforce the liability of the Steamer George D. Dixon for a moiety of the cargo loss.

Twenty-third. In holding the law, in view of the finding of mutual fault, requires that intervening underwriters recover back the full amount of their outlays.

[fol. 331] Twenty-fourth. In holding the policies of insurance issued by intervening underwriters were paid for by cargo owners.

Twenty-fifth. In holding such policies of insurance, "in respect to securing cargo insurance" were primarily for the benefit of cargo owners.

Twenty-sixth. In holding cargo owners are the real beneficiaries of such insurance.

Twenty-seventh. In holding Great Lakes Transit Corporation assumed to shippers an obligation to provide marine insurance on such cargo.

Twenty-eighth. In holding shippers had an insurable interest in the policies of insurance issued by intervening underwriters, respecting the legal liability of the Great

Lakes Transit Corporation arising from its failure to procure marine insurance on their goods.

Twenty-ninth. In holding shippers are the real beneficiaries of such policies in so far as concerns such last mentioned liability.

Thirtieth. In holding the rights of the parties were not affected by payment by Great Lakes Transit Corporation of the cargo losses out of its own moneys.

Thirty-first. In holding such payments were made on the theory Great Lakes Transit Corporation might thus deny the underwriters' subrogation.

Thirty-second. In holding denial of underwriters' alleged right of subrogation would allow Great Lakes Transit Corporation to profit by its own wrong.

Thirty-third. In holding the doctrine of Wager v. Providence & Washn. Ins. Co. (150 U. S. 99) has no application to the present case.

Thirty-fourth. In holding that underwriters are entitled to be and are subrogated to the rights of such owners, shippers and consignees of cargo laden on board the Steamer George D. Dixon for the recovery of full indemnity thereon and are entitled to enforce liability of the Steamer George D. Dixon so as to thereby provide full recompense to said intervening underwriters for the amounts paid and to be paid by them.

Thirty-fifth. *In adjudging and decreeing* that Atlantic Mutual Insurance Company and other similarly situated underwriters intervening herein recover a moiety of the amount of payments made and to be made by them for the [fol. 332] benefit of owners, shippers and consignees of such cargo, from the Steamer George D. Dixon and owner, with costs.

Thirty-sixth. In decreeing that any balance which said intervening underwriters shall not be able to collect from or enforce against the Steamer Willis L. King be paid by the Steamer George D. Dixon to the amount of its stipulation for value.

Thirty-seventh. In adjudging and decreeing that with respect to any balance of damages sustained by owners,

shippers and consignees of such cargo, Great Lakes Transit Corporation as bailee and trustee of owners, shippers and consignees of cargo, recover a moiety thereof from the Steamer George D. Dixon and from Great Lakes Transit Corporation individually.

Thirty-eighth. In holding that any balance of said last mentioned sum which Great Lakes Transit Corporation as such bailee shall not be able to collect from or enforce against the Steamer Willis L. King be paid by the Steamer George D. Dixon to the amount of its stipulation for value.

Thirty-ninth. In failing to make provision in the said decree for the recovery by Great Lakes Transit Corporation of amounts paid by it in settlement and discharge of such cargo claims, to the extent of the deductible average specified in the said policies of insurance.

Fortieth. In failing to make any provision whatsoever in said decree for the reimbursement by intervening underwriters of their proper proportion of the costs and expenses of Great Lakes Transit Corporation in commencing and maintaining this suit; and in failing to hold that intervening underwriters should reimburse Great Lakes Transit Corporation therefor.

Forty-first. In failing to hold that to the extent and by reason of payments made by them under said policies of insurance to Great Lakes Transit Corporation, intervening underwriters were entitled to become subrogated to only the rights of Great Lakes Transit Corporation individually.

Forty-second. In failing to hold that intervention by said underwriters herein should be permitted only if and to the extent that such intervention shall not prejudice or affect the rights of Great Lakes Transit Corporation as against the Steamer Willis L. King or owner, or under the said policies of insurance.

[fol. 333] Forty-third. With respect to the holding of the Court that Great Lakes Transit Corporation is liable for failure to procure marine insurance on cargo, the Court further erred in determining an issue not raised by any pleading or proof in the causes or in any other way presented to the Court for decision herein.

Forty-fourth. With respect to decreeing that intervening underwriters recover from the Steamer George D. Dixon

and Great Lakes Transit Corporation a moiety of the payments made by underwriters on account of cargo losses, the District Court further erred in granting relief not prayed for by the intervening petition of underwriters or any other pleadings in the case, and not warranted by the proofs, and in failing to hold that the only issues raised by the pleadings of intervening underwriters and by the proofs in connection therewith were in respect of rights of such underwriters as against the non-carrying vessel.

Dated August 6, 1934.

Brown, Ely & Richards, Proctors for Great Lakes Transit Corporation, Respondent, Libellant and Impleaded Respondent.

In United States District Court

Order Allowing Appeal in Cases Nos. 3168 and 3170

(Entered August 8, 1934, by Paul Jones, Judge)

The petition of Great Lakes Transit Corporation, named in the above entitled consolidated causes as libellant, respondent and impleaded respondent, praying the allowance of appeal therein to the United States Circuit Court of Appeals for the Sixth Circuit, having been filed herein, and it appearing to the Court that the said libellant, respondent and impleaded respondent has filed its assignment of errors as required by the rules of the United States Circuit Court of Appeals for the Sixth Circuit, it is hereby

[fols. 334-346] Ordered, that said appeal be and the same hereby is allowed as prayed for, and the amount of the bond to be given on said appeal is fixed at Five Hundred Dollars ($500.00) and it is further

Ordered, that hereafter, in accordance with the rules governing the taking of such an appeal, a transcript of the record and proceedings herein, duly certified, be transmitted to the United States Circuit Court of Appeals for the Sixth Circuit, and it is further

Ordered, that all proceedings, with respect to damages before the Special Master Commissioner designated in the said interlocutory decree, except those with respect to damages of the said John Milko, shall be stayed until final determination of such appeal.

[fol. 347] In United States Circuit Court of Appeals for the Sixth Circuit

Cause Argued and Submitted

(February 11, 1936—Before Hicks, Simons and Allen, JJ.)

This cause is argued by J. B. Richards and D. S. Jackson for appellant and by T. H. Garry and Ray M. Stanley for appellees and is submitted to the court.

In United States Circuit Court of Appeals

Decree—Filed June 5, 1936

Appeal from the District Court of the United States for the Northern District of Ohio

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause be and the same is hereby affirmed.

[fol. 348] In United States Circuit Court of Appeals

Opinion—Filed June 5, 1936

Before Hicks, Simons and Allen, Circuit Judges

Hicks, Circuit Judge:

Interstate Steamship Company, owner of the Steamer "Willis L. King," brought suit against Great Lakes Transit Corporation, owner of the Steamer "George D. Dixon," for $46,864.35, damages for negligence leading to a collision between the two steamers in the St. Clair River.

The Transit Corporation denied that the Dixon was negligent and brought a counterclaim against the King and its owner for $120,000.00 on behalf of itself and as bailee of the damaged cargo. The Interstate Company then impleaded the Transit Corporation as the owner of the Dixon under the 56th Admiralty Rule to answer the cargo claim in the second case. John Milko, a seaman on the Dixon, who was injured, intervened in the second suit.

The court heard the cases as a consolidated cause, found that the collision resulted from the fault of both vessels, divided the damages and costs and appointed a Special Master Commissioner to determine and report the amount of damages sustained, including damages to the owner of the Dixon as bailee of cargo, and damages for personal injuries to Milko. While the cause was pending before the Master Commissioner, the Atlantic Mutual Insurance Company filed an intervening petition as insurer and underwriter of the cargo of the Dixon against the King and the Interstate Company and sought a decree for $6,401.57, the amount it had paid for damages to cargo, and for further undetermined sums for which it was liable. It was stipulated that this petition should for all purposes stand as an intervening petition of fourteen other underwriters which had issued insurance aggregating $1,100,000.00 under similar policy conditions. The Transit Corporation and the Interstate Company filed answers and the facts were stipulated for the purpose of permitting the court to pass upon the rights of the intervening underwriters.

The Court found that the cargo owners were the beneficiaries of the insurance and entered an interlocutory decree against each vessel and its owners for a moiety of the damages sustained by cargo on the Dixon, with provision for recovery from either of any deficiency not collectible from the other, and directed the Master Com-
[fol. 349] missioner to determine and report the amount of the cargo damage.

The Transit Corporation appealed. It complains of the findings that the Dixon as well as the King was at fault; that the insurance was taken out to protect the cargo owners; and that it must therefore pay a moiety of the cargo damages.

On August 11, 1933, at 4:53 P. M., the King (580 feet long, 58 feet beam, 32 feet deep and drawing about 18½ feet) passed Port Gratiot light ship at the foot of Lake Huron and entered the St. Clair River, bound down the lakes with a cargo of ore. The course of the river at its source was slightly west of south, then slightly east of south, and at its junction with the Black River in Port Huron veered again to slightly west of south. The current at this point was about two miles per hour and toward the Canadian shore.

At the same time the steamer Dixon (350 feet long, 46 feet beam, and 30 feet deep and drawing 10 feet forward and 16 feet aft) was proceeding up the river below Port Huron, bound with a cargo of package merchandise from Buffalo to Milwaukee.

The point of collision, as fixed by both captains, was approximately a mile below the mouth of the Black River and slightly east of the middle of the river upon the Canadian side of the International Boundary. It is more definitely located as slightly below the Canadian docks of the Imperial Oil Company.

Capt. Watts of the King testified that when he passed the traffic buoy just about the mouth of the Black River, which marked the separation of routes for upbound and downbound traffic, his engine was going full speed; that this would give the King a speed of 11½ miles per hour in deep water and that although the shallow water of the river would retard it somewhat, still, with the aid of the current his boat was making more than 9 miles per hour.

Bulletin No. 42, Survey of Northern and Northwestern Lakes, issued by the War Department Corps of Engineers, in April, 1933, promulgated two rules for the navigation of this part of the St. Clair:

"Rule 1. All downbound vessels navigate the American channel. All upbound vessels shall navigate the Canadian channel. • • •"

[fol. 350] "Rule 2. The speed of vessels navigating these channels shall not exceed 9 miles per hour."

Watts testified that just below the Black River the weather, which had been clear, set in with a violent rain squall and wind, and that just then he heard a fog signal of a vessel down the river and that he immediately blew a fog signal of three blasts and checked to half speed; that visibility was reduced to 900 or 1000 feet and appeared to be worse further down the river, though both banks were visible at all times.

He further testified that he heard only one fog signal and that he blew a two blast passing signal, indicating that he was directing his course to port (the Canadian side), and calling for a starboard passing; that thirty or forty seconds later he blew a second two blast signal and received no answer but that the Dixon then became visible 1200 to

1500 feet away on his starboard bow and in alignment for a starboard to starboard passing.

Watts further testified that he was on the Canadian side of the river and about 500 feet offshore, with his course trained on the Mueller plant (Canadian), about 1½ miles away, when he blew a third two blast whistle, after which the Dixon moved to its starboard and across the King's bow. Both the first mate and the wheelman of the King testified that the King blew three two blast passing signals. The watchman testified that he heard at least two two blast passing signals. The mate heard no fog signal from either vessel. None of the King's crew testified to hearing any signal from the Dixon other than the first fog signal.

Watts testified that because of the storm and low visibility he went to the Canadian side in order to turn and anchor on the American side. As soon as the Dixon was seen to move to starboard the King backed full speed, blew a danger signal and a two blast passing signal, but the Dixon kept coming across her bow and the King's bow struck the Dixon at a point about 143 feet from her stem on her port side. The weight of the evidence is that the collision took place about 5:40 P. M. The Dixon continued across the King's bow to the Canadian shore and the King kept backing in order to stand by if needed.

Capt. Goodberry of the Dixon testified that when he was about a half mile below Reed's Dry Dock (marked "R" [fol. 351] on appellant's Exhibit A and shown on libellant's Exhibit I as the lagoon) and slightly on the Canadian side, he saw a cloud coming from the west and that it began to rain; that he immediately ordered the speed checked so that when he passed the dock he was going about two miles per hour or one-half mile faster than steerage way.

The engineer, assistant engineer and oiler of the Dixon testified that her engines were checked before the collision. Their estimates of the intervening time varied from eight to fourteen minutes. The engineer's log showed the check at 5:25. Goodberry testified that he blew the first fog signal a couple of minutes after the check; that visibility was cut down but that he could always see the Canadian shore; that when he was about opposite Reed's Dry Dock he heard an answer upstream and then blew a second fog signal; that right after that he heard a one blast signal (for a port to port passing) from up the river, which he answered and

ported half a point. He then blew another fog signal and heard a second one blast signal ahead which he answered, after which he ported a point. He then blew another fog signal which was answered by a third one blast signal. He answered with one and told the wheelman to port again and "keep her coming." The rain and fog lasted three or four minutes and was nearly over when he saw the King. The next thing he heard was five short whistles and he looked and saw the King's light on his port side and about 400 feet from the Canadian shore and almost abeam. He testified that the King then gave two whistles and came out of the fog not more than 400 or 500 feet away, but seeing that there was no chance of "giving him what he asked for" (a starboard to starboard passing) he blew one whistle and called out "hard aport." He testified that while he was thus headed for the Canadian shore the King came down the river pretty well over on the Canadian side, and struck the Dixon on her port side, at right angles; that the Dixon then ran full speed ahead, then reversed, checked, and anchored on the Canadian side.

Coffield, the mate of the Dixon, and Lemke, who was on watch, confirmed in every particular Goodberry's account of the whistles of both ships and their sequence.

Dr. Francois, an outside witness, testified for the King. He testified that he was on the point of the Foundation Com- [fol. 352] pany's slip, 20 or 25 feet north of the Steamer Spokane, which was moored there. This was near Reed's Dry Dock. He testified that he saw the Dixon, as the storm came on, just east of midstream, and that it was going 12 to 14 miles an hour; that it blew one blast and disappeared into the storm; that he then heard a three blast fog signal and then another three blast signal which seemed to be from different whistles.

Capt. Geel, who was master and mate on the ferries running between Port Huron and Sarnia on the Canadian side, testified that he saw the Dixon pass his home in Port Huron and heard her blow her fog whistle and a one blast passing signal three times soon after the storm struck the locality.

Capt. Conlin, a master of 26 years' experience and in charge of barge repairing at the Wolverine Dry Dock, on the American side, a short distance north of the point of collision, testified that he left the dock about 5:30 and was driven north in an automobile; that the occupants of the car

were caught in the storm and stopped for a few minutes, at which time he heard a chime whistle blow one blast; that after the weather cleared a little he drove on and again heard a chime whistle answered by a coarser whistle; that soon after he left the car and while he was standing under an awning about a mile north of the Wolverine dock, and about ten minutes after hearing the first whistle, he heard a chime whistle blow five or more blasts down the river. It is undisputed that the King had a chime whistle and the Dixon a coarser one.

Ernest Brewer, caretaker of the Spokane, testified that he heard a one blast signal from the King, answered by the Dixon. There were other witnesses for appellant, sailors on the Dixon, who confirmed the testimony that one blast passing signals were exchanged at least twice before the collision. These men also spoke of a two blast signal from the King just before the accident.

We cannot accept the evidence of the King that the Dixon blew only one fog signal. There is every reason to believe that she not only blew several fog signals but also answering blasts to the King's passing signals. The weight of the evidence undoubtedly is that the course of the King was towards the Canadian side even though blowing one blast [fol. 353] signals, and no reason occurs to us why the King should not have heard the signals from the Dixon.

Capt. Watts' statement that he went to the Canadian side to turn his vessel is not convincing. There seems to have been no sufficient reason for that maneuver.

The court found that the King was at fault in not blowing an alarm and reducing speed when it found itself on the Canadian side in the neighborhood of another vessel which it could not see, in violation of Rules 15 and 26 (Pilot rules for the Great Lakes and other connecting and tributory waters) which prescribed that a steamer shall on hearing the fog signal of another vessel, apparently not more than four points from right ahead, reduce her speed to bare steerage way. We are in agreement but would lay additional emphasis on the King's speed in excess of nine miles an hour in violation of Rule 2 for navigation of this part of the river.

As to the negligence of the Dixon: Lemke, the lookout, standing watch on its forecastle head, testified that after the second one blast from the King, he reported to the cap-

tain a ship about a half point off the starboard bow, having seen the flash of its diamond light. He again saw this flash after the third one blast signal from the King. The light had then swung to the port side of the Dixon and he so reported it, but the Dixon was then porting heavily, was swinging across stream and was losing speed, and it might have apprehended from the position of the King's light that, even though it was then on the port side, the King was not in position to pass safely, as of course it was not. It was after this third one blast signal from the King that Goodberry ordered his wheelman "to port again and keep her coming." The Dixon could not, we think, absolve itself from blame by acting on the second one blast signal from the King, when, in so doing, it is clear she ignored information of a contradictory nature—the first flash of the light.

Granting that the King was being very badly navigated, still there is the testimony of the Dixon's own witnesses that this fact was brought home to the Dixon after the King's second one blast passing signal, her flash showing her still to be on the Dixon's starboard.

Pilot Rule II and Navigation Rule 26 would seem to bear on such a situation. The first reads in part:

"Rule II. If, when steamers are approaching each other, the pilot of either vessel fails to understand the course or [fol. 354] intention of the other, whether from signals being given or answered erroneously or from other causes, the pilot so in doubt shall immediately signify the same by giving the danger signal of five or more short and rapid blasts of the whistle; and if both vessels shall have approached within half a mile of each other, both shall be immediately slowed to a speed barely sufficient for steerageway, and, if necessary, stopped and reversed, until the proper signals are given, answered and understood, or until the vessels shall have passed each other."

And the second:

"Rule 26. If the pilot of a steam vessel to which a passing signal is sounded deems it unsafe to accept and assent to said signal, he shall not sound a cross signal; but in that case, and in every case where the pilot of one steamer fails to understand the course or intention of an approach-

ing steamer, whether from signals being given or answered erroneously, or from other causes, the pilot of such steamer so receiving the first passing signal, or the pilot so in doubt, shall sound several short and rapid blasts of the whistle; and if the vessels shall have approached within half a mile of each other both shall reduce their speed to bare steerageway, and, if necessary, stop and reverse."

It seems reasonably certain that the Dixon was going very slowly at the time of the collision. But it is also clear that Capt. Goodberry was in possession of information, or should have been, that should have raised doubts in his mind as to the intention of the King, namely, the knowledge that the King was still on his starboard bow, even after the second port to port passing signal. Had he observed either rule quoted above, he might not have averted the collision but a danger signal would have put the king on its guard. He could not forego any precaution on his part simply because the King was being badly navigated. The failure to blow a danger signal in the face of the King's palpable confusion in blowing a second port to port passing signal when it was still in line for a starboard passing, was negligence. [fol. 355] Pittsburgh S. S. Co. v. Duluth S. S. Co., 222 Fed. 834, 835 (C. C. A. 6); Hawgood Transit Co. v. Mesaba S. S. Co., 166 Fed. 697, 701 (C. C. A. 6). See The North Star, 62 Fed. 71 (C. C. A. 6); The San Simeon, 63 Fed. (2d) 798 (C. C. A. 2); The George W. Roby, 111 Fed. 601 (C. C. A. 6). We think the court correctly found both vessels at fault.

As to the second question, i. e., whether the cargo insurance was payable to the owners of the Dixon as carrier, or as bailee or trustee of the cargo for the owners:

The gist of the Transit Corporation's answer to the intervening petition was, that the policies of insurance were intended to, and did, insure and indemnify it against liability assumed by it to cargo owners for loss or damage, and that though the insurers had the cargo owner's right by subrogation against the King for a moiety there was no such subrogation against the Transit Corporation, since it was this very type of loss against which the insurers had agreed to indemnify it.

The King in its answer asked that its rights be preserved and that a decree be entered, showing that the King and

the Dixon were mutually at fault and dividing the damages and costs equally between the owners of the steamers.

In the absence of legislation, the Dixon's liability to cargo owners was absolute, being equivalent to that of an insurer. The Maggie Hammond, 9 Wall., 435, 444. This liability was modified by the Harter Act (46 U. S. C., §§ 190-195) but under § 9e of the Uniform Bill of Lading, approved by the Interstate Commerce Commission, and here used by the shippers and the Dixon, the saving clauses of the Harter Act might be waived or modified if the property was carried under a tariff which provided that the carrier should be liable for loss from perils of the sea.

Without going into a detailed analysis of the eleven tariff schedules under which the Dixon's cargo was carried, it seems clear that each of them was so worded as to waive the provisions of the Harter Act. These tariff schedules fall into three classes: in the first class, under the heading "Marine Insurance" are the words "Rates Named Herein Include Marine Insurance" and then follows:

"Rule No. 15. While shipments subject to rates named herein as including marine insurance are water borne at and [fol. 356] between lake ports on the vessels of the Great Lakes Transit Corporation, said corporation assumes liability for loss or damage to said shipments caused by marine perils, to-wit—of the seas, and lakes, fire, collision, etc."

In the second class, subdivided into two, under the headings, "Governing Marine Insurance on Rail and Lake Traffic" and "Marine Insurance," there was a specific assumption of liability (as above) but no express statement that rates include marine insurance.

In the third class the schedules contain the statement that "rates named in this tariff include marine insurance while in the possession of the Great Lakes Transit Corporation, or other named lake steamers" and then the provision—

"Liability of Carriers When Rates Include Marine Insurance. Property moving under rates named or provided for in this tariff while in the custody of the water carriers from the time they receive it • • • is insured: While water borne against the perils of the seas • • • collisions • • •"

These were the terms and conditions upon which appellant agreed to carry cargo and the owners would naturally con-

clude that their property was to be covered by policies of marine insurance (The Grecian, 8 Fed. Supp., 580, 582—D. C.) and we think the policies in suit were procured by appellant in compliance with its contracts and were issued primarily for the benefit of cargo owners.

It is true that in the opening paragraph of the policies appellant is the nominal insured but there follows the significant words "for account of whom it may concern;" then the phrase "loss to be paid • • • to Great Lakes Transit Corporation or order."

For the effect of these and similar phrases see Buck v. Chesapeake Ins. Co., 1 Pet., 114, 121; Munich Assur. Co. v. Dodwell & Co., 128 Fed. 410, 414 (C. C. A. 9); Symmers v. Carroll, 207 N. Y., 632, 637; Virginia-Carolina Chemical Co. v. Chesapeake L. & T. Co., 279 Fed. 684 (C. C. A. 2).

Then follows the coverage, described as—"On First Interest as per form attached." This form repeats the phrase, "for account of whom it may concern" and continues, "loss, [fol. 357] if any, payable to Great Lakes Transit Corporation or order." The specific coverage is upon "any cargo per vessels sailing from initial port prior to December 12, 1933, midnight (Chicago time) until Great Lakes Transit Corporation's responsibility therefor ceases." The coverage continues; "On cargo of any kind owned by the assured and on the assured's liability to others in respect to cargo of any kind covering same from time said Great Lakes Transit Corporation becomes responsible therefor and until its responsibility ceases. • • •"

Again, the policy provides, "and also the insurance of said *cargo against perils of the seas and lakes;*" and further, "and for any and all claims which said *cargo may be called upon to contribute in general average.*" (Italics ours.)

The policy contains the following further provision:

"Liability under this policy for any loss or losses, claim or claims, arising in respect to each cargo while on board of each the above named steamers and/or substituted steamers • • • including connecting water conveyances or in respect to cargo while on docks, wharves or elsewhere on shore as the result of any one occurrence is hereby limited • • •"

There is a provision covering damages to shipments in refrigerators and the usual standard "sue and labor" clause. It would also seem, as indicated by the District Judge, that the phrase "on the assured's liability to others in respect to cargo" would protect cargo owners against a breach of appellant's obligations to furnish marine insurance for which the owners had agreed to pay a higher rate.

Appellant relies upon the following clause found in each of the policies:

"The Assured" (the Transit Corporation) "taking upon themselves as to said cargo or parts thereof, * * * the insurance of said cargo against perils of the seas and lakes * * * and the said Assurers agree and undertake to indemnify * * * said Assured * * * to the extent to which the Assured may be held liable by the owners thereof under any liability the Assured shall have assumed as common carriers, insurers, or otherwise * * *"

[fols. 358-360] But this clause does not avail appellant because it did not take upon itself the insurance of cargo or assume any liability with reference thereto as an insurer. Its obligation as to insurance went no further than to require it to procure policies of insurance from others. We think the parties could not have failed to understand that these policies were issued primarily for the benefit of cargo and that the payments made and to be made by the underwriters were in settlement of their liability to cargo owners. It follows that, under general principles of equity, the underwriters were entitled by subrogation to all the rights of the cargo owners to recover the amounts paid. Liverpool & Great Western Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 462; Mason v. Marine Ins. Co., 110 Fed. 452, 456 (C. C. A. 6); Federal Ins. Co. v. Detroit Fire & Marine Ins. Co., 202 Fed. 648, 651 (C. C. A. 6); and their claims may be prosecuted by intervention. Mason v. Marine Ins. Co., supra; Federal Ins. Co. v. Detroit, etc., Ins. Co., supra.

The court having, as we think properly, found that the collision was caused by both the King and the Dixon, there was no error in decreeing a recovery in behalf of the underwriters for a moiety of the payments made, and to be made, by them on account of loss to cargo, with the provision that any balance uncollectible from one should be paid by the other.

It is urged that there is no basis for such a decree against the Dixon because the intervening petitions of the underwriters sought relief against the King and its owners only. This objection is without merit for appellant treated the intervening petitions as a sufficient basis for relief and stipulated the facts for the express purpose of permitting the court to pass upon the rights of the intervening underwriters "in so far as concerns the form of interlocutory decree to be entered."

The decree is affirmed.

[fol. 361] In United States Circuit Court of Appeals

[Title omitted]

Petition for Rehearing—Filed July 3, 1936

To the Circuit Court of Appeals for the Sixth Circuit:

The petition of Great Lakes Transit Corporation respectfully shows:

That the opinion of this Court directing affirmance of the interlocutory decree of the District Court herein was filed on June 5, 1936, and it appears from such opinion:

(a) That in directing enforcement in favor of intervening underwriters of a liability of appellant for cargo loss, as common carrier, the Court has misconstrued and overlooked the portions of the insurance policy whereby these same underwriters expressly agree to indemnify appellant against all liability on its part, as a common carrier or otherwise, with respect to cargo losses.

(b) That the Court failed to give effect to a controlling decision of the Supreme Court of the United States (Wager vs. Providence Ins. Co., 150 U. S. 99).

[fol. 362] (c) That the Court misconstrued the question presented for decision and the stipulated facts in stating the question was "whether the cargo insurance was payable to the owners of the Dixon as carrier, or as bailee or trustee of the cargo for the owners", whereas the stipulated facts were that, as customary under such policies, the underwriters paid appellant to reimburse it for amounts it had paid, as carrier, for its own account.

That the grounds and reasons for this petition more fully appear in the brief annexed hereto, which your petitioner prays may be considered as a part of this application.

Wherefore, your petitioner prays that a rehearing may be granted to it in this cause, upon the issue as to the rights of the Atlantic Mutual Insurance Company and similarly situated underwriters.

Dated this 2nd day of July, 1936.

Great Lakes Transit Corporation, by Harry S. Noble, President.

State of New York,
County of Erie, ss:

Harry S. Noble, being duly sworn, deposes and says that he is an officer, to wit, the President of Great Lakes Transit Corporation, the petitioner above named; that he has read the foregoing petition and knows the contents thereof; that the said petition is presented in good faith and not for delay, and that deponent has fully and fairly stated to petitioner's counsel, John B. Richards and David S. Jackson, [fol. 363] the facts connected with the issues mentioned in said petition, and that the said application for rehearing is well founded as petitioner is advised by his said counsel; and verily believes.

Harry S. Noble.

Subscribed and sworn to before me this 2nd day of July, 1936. Harold K. Duchmann, Notary Public in and for Erie County, New York.

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that in our opinion it is well founded.

John B. Richards, David S. Jackson, Counsel for Petitioner.

[fol. 364] [Title omitted]

Brief in Behalf of Appellant on Application for Rehearing

The following facts are admitted or have been found by the Court:

1. That the Great Lakes Transit Corporation as a common carrier by water, was with its Steamer Dixon transporting the cargo which was damaged.

2. That the Transit Corporation as such a common carrier by its tariff waived the saving clauses of the Harter Act, and its liability to cargo was "equivalent to that of an insurer." (Opinion p. 8.)

3. That by reason of its waiver of the Harter Act, under a finding of mutual fault the Transit Corporation became [fol. 365] directly liable to cargo owners for a moiety of damages to cargo and a moiety of the charges payable by cargo.

4. That the Transit Corporation was the named assured "for account of whom it may concern", and in every place in the policy of insurance in which the word "assured" is used, the Transit Corporation is meant, or at least included.

5. That during the years 1928 to 1933 inclusive, the Great Lakes Transit Corporation had carried general cargoes under bills of lading in the same form, and under policies issued by the Atlantic Mutual Insurance Company and other similarly situated underwriters in substantially the same form as those in evidence, and during said period like procedure had been followed as in this case, to wit: Cargo owners presented to the Transit Corporation their claims for damage arising out of perils of the sea, the Transit Corporation paid such claims and was reimbursed therefor by underwriters to the extent thereof less the deductible average provided in the policy (Stipulation of Facts, Rec. p. 267).

The Court has held that the policies were issued primarily for the benefit of cargo owners (Opinion p. 9). The question presented is not whether the policies were primarily for the benefit of cargo owners, but whether they were solely for their benefit, in other words, was this a single or a double coverage? Having in mind that the Transit Corporation paid $24,970.00 (Rec. 275) in premiums on $1,100,000.00 of insurance, waived the saving clauses of the Harter Act, and assumed a liability equivalent to that of an insurer with respect to every conceivable cargo loss, it would seem passing strange if it was uninsured with respect to its liability to cargo. The result of the decision of this Court is that notwithstanding its pay-

[fol. 366] ment of a premium of almost $25,000, since underwriters are subrogated to the rights of cargo owners they can recover from this responsible Transit Company every loss thus paid, and the policies are worthless pieces of paper. That the underwriters did not so construe the policies is shown by the fact that for five years the Atlantic Mutual Insurance Company and other intervening underwriters which had issued to the Transit Corporation policies in substantially the same form as the policy in the case at bar, have reimbursed the Transit Corporation for its payments to cargo owners shipping goods under bills of lading similar in form to those in the case at bar, for damage and expense arising out of perils of the sea, which includes collision, stranding and stress of weather, and a large number of other marine disasters, occasioned with or without negligence. Corpus Juris, Vol. 38, page 1098.

A moiety of the cargo damage was decreed against the Transit Corporation on account of its liability as a common carrier since, as this court states, the Transit Corporation having waived the saving clauses of the Harter Act its liability "was absolute, it being equivalent to that of an insurer" (Opinion p. 8).

That no refusal has ever been made by underwriters to reimburse the Transit Corporation on account of the liability which it has assumed with respect to cargo, and no attempt has ever been made to recover back payments thus made, is not strange since no words could possibly be chosen to more clearly express the agreement of underwriters to indemnify the Transit Corporation as a common carrier than the following policy provision which is quoted in part in the Court's opinion:

"The said Assurers" (Atlantic Mutual Insurance Co. et al.) "agree to indemnify said assured" (Great Lakes Transit Corporation) "to the extent to which the assured" [fol. 367] (Transit Corporation) "may be held liable under any liability the assured" (Transit Corporation) "shall have assumed as common carriers, insurers, or otherwise." (Rec. 277; Opinion p. 10.)

In order that there could be no possible contention that some liability to cargo owners had been assumed, which was not that of a common carrier, and in order that the coverage should be full and complete, after the words "common

carrier'' we find the words ''insurers, or otherwise,'' the underwriters thereby stating that no matter what liability is assumed, in so far as cargo loss is concerned, we, the underwriters, will reimburse you.

Although not in any way necessary to a decision, since the agreement of underwriters to indemnify the Transit Corporation against the liability which it assumed as a ''common carrier • • • or otherwise'' • • • suffices, we think the Court misconstrued the policy in rejecting appellant's claim that the underwriters are also liable under the portion of the clause whereby they assumed appellant's liability as an insurer. The policy is a contract between the Transit Corporation and the underwriters. It states that it is agreed that the assured (Transit Corporation) are ''taking upon themselves as to said cargo the insurance of said cargo against the perils of the seas and lakes'' and the assurer agreed to indemnify the said assured (Transit Corporation)—''as insurers.'' When the parties to a contract both characterize a liability as that of an insurer and one agrees to indemnify the other against such liability, surely the contract is not wholly ineffective because the liability which the parties have in contemplation and have so characterized in their agreement is technically only ''equivalent to that of an insurer'' and not ''as an insurer.''

In addition the above-quoted clause and the other provisions of the special rider form we also desire to call par- [fol. 368] ticular attention to the fact that in the opening clauses defining the specific nature of the coverage it is stated that it is

''on the Assured's liability to others in respect to cargo of any kind.''

Eliminating the liability features of the policies and considering them merely as insurance upon cargo underwriters cannot recover a moiety of the damage from the Transit Corporation under the doctrine of Wager vs. Providence Insurance Co., 150 U. S. 99, since an underwriter cannot be subrogated as against a named assured.

In the above case Morse & Co. took out an open running policy which provided that underwriters by

> ''This policy of insurance, on account of Morse & Co. *for account of whom it may concern,* do insure the

> several persons whose names are hereafter endorsed hereon as owner * * * or common carrier on goods, wares and merchandise on its own boat or boats belonging to others, etc." (Italics ours.)

Two bills of lading were issued, one by Morse & Co. and another, referred to as a sub-bill, by the master of the "Sydney" which towed and had control of the towing tug. Morse & Co. applied for and received a certificate of insurance from underwriters to the effect that it had insured the cargo in question in the amount of $9875, loss, if any, payable to assured or order upon return of this certificate. The certificate was endorsed in blank and delivered to Armour, Plankinton & Co., Buffalo agent of the cargo owner. Thus an open policy to Morse & Co., a named assured, "for whom it may concern", a certificate evidencing such insurance was issued, and by an endorsement was delivered, held and owned by the cargo owner itself. The cargo was lost and underwriters paid Armour, Plankinton & Co., cargo owners, for the loss. Underwriters then [fol. 369] brought suit against Morse & Co., which had issued the bill of lading whereby it was agreed that cargo was to be delivered in good order at destination, claiming that since the policy read "for whom it may concern," and since the certificate had been issued and endorsed to the owner of the goods, it was the only party insured, and Morse & Co. was liable as carrier. We quote from the opinion of the Supreme Court:

> "Clearly, under this state of facts, H. Morse & Co. were, nominally at least, the parties insured, and came within the terms of the policy, and, upon a loss, were entitled to receive the amount of the policy, and, of course in that event, the insurers could not, after having paid H. Morse & Co. the amount of the loss, *recover it back* from them under the principle of equitable subrogation." (109). (Italics ours.)

The Wager case is an authority to the effect that irrespective of the fact that policies of insurance, payable to a named assured "for whom it may concern", are issued primarily for the benefit of cargo owners (Opinion p. 9), nevertheless underwriters cannot be subrogated to the rights of the cargo owners against the named assured. This decision

has never been overruled or questioned but has been followed many times.

To the same effect as the Wager case are:

> The John Russell, 68 Fed. (2d) 901; Sorenson vs. Boston Inc. Co., 20 Fed. (2d) 640; Gross vs. New York & Texas S. S. Co., 107 Fed. 516; Phoenix Ins. Co. vs. Erie & Western Transp. Co., 117 U. S. 312, at pp. 320-325.

The case at bar is, of course, much stronger in so far as the carrier is concerned, than the Wager case. In the Wager case, after the issuance, endorsement and delivery of the certificate, Morse & Co., in so far as actual reimbursement for cargo damage was concerned, was eliminated from [fol. 370] the transaction entirely. When payment time came underwriters dealt directly with the cargo owner, Armour, Plankinton & Co., and paid the cargo loss to it. In the case at bar, although both Schedule A (Rec. 268) and the first interest (Rec. 275) provided that loss was payable to Great Lakes Transit Corporation or order, the Transit Corporation first paid cargo owners by its own voucher drafts containing receipts running directly to the Transit Corporation (Schedule "E", Rec. 295), and were later reimbursed by underwriters by checks payable to its order individually, not as bailee or trustee for cargo. In this case, had the Transit Corporation issued orders to underwriters to pay cargo owners their loss and expense, under the doctrine of the Wager case underwriters could not have recovered back the amount of such payments. Surely underwriters paying the Transit Company directly for its own account, not as trustee or bailee for cargo, cannot recover back the payments thus made.

Although in our main brief (pp. 66, 67) we discussed the Wager case at length, since it cannot be distinguished from the case at bar, proctors for underwriters do not refer to it or cite it in their brief, and the Court apparently overlooked it.

The ground suggested by Judge West for distinguishing the Wager case (Rec. pp. 318-319) is wholly untenable for the reasons discussed at length on pp. 68-71 of our main brief.

Underwriters have no right to recover back moneys voluntarily paid by them to reimburse the Transit Corporation for its payments to cargo owners.

As we have pointed out above, from 1928 to 1933 inclusive, the Transit Corporation had issued tariffs, pro-
[fol. 371] cured insurance substantially the same as presented to this Court, and during these five years the Atlantic Mutual and other underwriters had reimbursed the Transit Corporation for losses paid by it to cargo owners arising out of perils of the seas, including collision. (Stipulation of Facts, Rec. 276.) After the decision of mutual fault no one imagined that with the policies speaking precisely as to the risk assumed by the underwriters and the history above recited, anyone could contend that the policies, for which the Transit Corporation paid a premium of almost $25,000, were entirely worthless to it and it was wholly uninsured with respect to its liability to cargo. Likewise none of the parties to this litigation imagined that underwriters could recover back a payment voluntarily made to its named assured to reimburse it for payment to cargo owners for the liability the named assured had assumed and for which by payment as well as by policy provisions underwriters conceded they were liable. Although the opinion states that the question presented is

> "whether the cargo insurance was payable to the owners of the Dixon as carrier, or as bailee or trustee of the cargo for the owners." (P. 8.)

this cannot be correct, first, for the reason that it is contrary to the stipulated facts (Rec. 265-266), and, second, that since the Transit Corporation paid cargo owners in full with its own funds for the loss they sustained, long before it was reimbursed by underwriters, at the time of such reimbursement it could not have been acting as bailee or trustee for anyone. It received such reimbursement for its own account. If underwriters were subrogated to the rights of cargo owners as against the Transit Corporation, or considered they had any such right, they would have refused reimbursement to the Transit Corporation. How-
[fol. 372] ever, the stipulated facts are not only that they have reimbursed the Transit Corporation, less the deductible average, for the portion of the cargo loss which it had previously settled with its own moneys, but:

"That when further claims not approved and paid on the date of said adjustment, to wit: January 22, 1934, are received, approved and *paid by the Great Lakes Transit Cor-*

poration, a further statement or statements will be made *and payment will be made in like manner by the underwriters,* and that finally when all data is at hand, a General Average statement will be prepared by said adjusters, and when this statement is approved by underwriters *they will make payment to the Great Lakes Transit Corporation* of cargo's proper proportion of General Average and like expenses *in the same manner as they made payment under the adjustment of January 22, 1934.*" (R. p. 266; italics inserted.)

No mistake of fact or fraud is claimed in pleading, proof or argument to support a recovery back of the moneys previously paid by underwriters to the Transit Corporation. Nevertheless this court has not only decreed such a recovery, but also a recovery of future payments, contrary to the stipulated facts as to the rights of the parties.

It is therefore respectfully submitted that a rehearing should be granted upon the question as to the rights of intervening underwriters.

Respectfully submitted, Brown, Ely & Richards,
Proctors for Great Lakes Transit Corporation.
John B. Richards, David S. Jackson, Of Counsel.

[fol. 373] In United States Circuit Court of Appeals

Order Denying Petition for Rehearing—Filed November 7, 1936

The petition to rehear is denied.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 374] Supreme Court of the United States

Order Allowing Certiorari—Filed March 8, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted, limited to the second question presented by the petition for writ of certiorari.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 375] SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO PRINTING RECORD—Filed March 12, 1937

It is hereby stipulated, by and between the counsel for the respective parties hereto that the printed record herein may consist of the following, references herein being to pages of the printed record as certified to by the Clerk of the United States Circuit Court of Appeals for the Sixth Circuit:

(1) Page 1 of printed record as certified by the Clerk of the Circuit Court of Appeals for the Sixth Circuit.

(2) Libel of Interstate Steamship Company vs. Great Lakes Transit Corporation (pages 2-5).

(3) Answer of Great Lakes Transit Corporation to libel of Interstate Steamship Company (pages 6-10).

(4) Page 15 of printed record as certified by the Clerk of the Circuit Court of Appeals for the Sixth Circuit.

(5) Libel of Great Lakes Transit Corporation vs. Steamer "Willis L. King" and Interstate Steamship Company (pages 16-21).

(6) Claim of respondent and claimant, Interstate Steamship Company (page 22).

(7) Answer to libel filed by Great Lakes Transit Corporation (pages 23-26).

(8) Petition under the 56th Admiralty Rule to bring in Great Lakes Transit Corporation, owner of the Steamer "George D. Dixon", as carrier and/or bailee of cargo, to answer cargo claim (pages 34-38).

(9) Answer of Great Lakes Transit Corporation, as owner of the Steamer "George D. Dixon" and as impleaded respondent, to its libel and complaint as carrier and/or bailee of cargo (pages 39-40).

(10) Answer of Great Lakes Transit Corporation to petition of Interstate Steamship Company under the 56th [fol. 376] Admiralty Rule bringing in Great Lakes Transit Corporation to answer cargo claim (pages 40-44).

(11) Statements on pps. 55 & 56 of printed record as certified by the Clerk of the Circuit Court of Appeals showing consolidation of cases.

(12) Memorandum, opinion and decision of the District Court dated March 28, 1934 (pages 242-251).

(13) Petition of Great Lakes Transit Corporation for reargument (pages 251-252).

(14) Memorandum of Judge West denying petition for reargument (foot of page 252 of printed record).

(15) Order denying petition for reargument (page 253).

(16) Petition of Atlantic Mutual Insurance Company intervening for its interest as insurer and underwriter of the cargo of the Steamer "George D. Dixon" (pages 253-258).

(17) Stipulation with respect to and for the benefit of insurance companies other than Atlantic Mutual Insurance Company that the intervening petition of Atlantic Mutual Insurance Company stand as and for the intervening petition of each of said insurance companies dated May 27, 1934 (pages 258-261).

(18) Stipulation dated June 13, 1934 and Schedules "A" to "F", inclusive, annexed to said stipulation (pages 262-305).

(19) Answer of Great Lakes Transit Corporation to intervening petition of Atlantic Mutual Insurance Company (pages 306-310).

(20) Answer of Interstate Steamship Company to intervening petition of Atlantic Mutual Insurance Company (pages 311-314).

(21) Opinion and decision of the District Court dated July 9, 1934 on settlement of interlocutory decree (pages 315-316).

(22) Letter dated July 10, 1934 from S. H. West, Judge, to Messrs. Stanley & Gidley and Messrs. Brown, Ely & Richards re opinion (pages 316-317.)

(23) Supplemental opinion and decision of District Court dated July 27, 1934 on settlement of interlocutory decree (pages 317-319).

(23) Interlocutory decree (pages 319-324).

(24) Notice of appeal, proof of service and waiver of citation (pages 324-325).

(25) Petition for appeal (page 326).

(26) Assignments of error (pages 328-332).

(27) Order allowing appeal (pages 333-334).
[fol. 377] (28) Proceedings in the United States Circuit Court of Appeals for the Sixth Circuit (pages 347-373).

and that each and every other part of the record as certified by the Clerk of this Circuit Court of Appeals for the Sixth Circuit may be eliminated from the printed record.

Dated: March 9th, 1937.

Rhumes E. Coffey, Brown, Ely & Richards, Counsel for Petitioner. Frederick L. Leckie, Thomas H. Garry, Duncan, Leckie, McCreary, Schlitz & Hinslea, Counsel for Respondent, Interstate Steamship Company. Stanley & Gidley, Counsel for Atlantic Mutual Insurance Company et al.

[fol. 378] [File endorsement omitted.]

Endorsed on cover: File No. 41,256. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 716. Great Lakes Transit Corporation, Petitioner, vs. Interstate Steamship Company and Atlantic Mutual Insurance Company et al. Petition for a writ of certiorari and exhibit thereto. Filed February 6, 1937. Term No. 716, O. T., 1936.

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No. 716

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CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, 1936.

GREAT LAKES TRANSIT CORPORATION,
Petitioner,

against

INTERSTATE STEAMSHIP COMPANY and ATLANTIC MUTUAL INSURANCE COMPANY, *et al.*, Intervening Underwriters,
Respondents.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

BROWN, ELY & RICHARDS,
Proctors for Petitioner.

LAURENCE E. COFFEY,
Of Counsel.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

GREAT LAKES TRANSIT CORPORATION,
Petitioner,

vs.

INTERSTATE STEAMSHIP COMPANY
and
ATLANTIC MUTUAL INSURANCE COMPANY, *et al.*, Intervening Underwriters,
Respondents.

PETITION.

Your petitioner, Great Lakes Transit Corporation, prays for a writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit, to review its order and decree filed June 5, 1936 (347), affirming the decree of the United States District Court for the Northern District of Ohio, Eastern Division, and to review the order of the Circuit Court of Appeals denying petitioner's motion for reargument (373). The opinion of the Circuit Court of Appeals (348) is reported at 86 Fed. (2) 740 (Adv. Sheets No. 8, Feb. 1, 1937), and the opinions at the District Court, three in number (242, 315, 317) are not officially reported.

The Nature of the Case.

On August 11, 1933 there was a collision in the St. Clair River, opposite the City of Port Huron, between

petitioner's Steamer GEORGE D. DIXON and the Interlake Steamship Company's Steamer WILLIS L. KING. Each vessel owner brought suit in admiralty against the other. John Milko, a seaman injured in the collision, intervened and the suits were consolidated (56). After the decision on the question of fault the Atlantic Mutual Insurance Company and other underwriters intervened, claiming the right to collect full cargo damage and loss from the Interstate Steamship Company, the non-carrying vessel. The Interstate Steamship Company, under the 56th Rule in Admiralty, impleaded the Transit Corporation, which answered the intervening petition (40). No testimony was taken on the issues raised by the intervening petition, and the answers thereto, all facts bearing thereupon being stipulated (262-305).

The interlocutory decree adjudged each vessel in fault for the collision and that the intervening underwriters could recover a moiety of the cargo damage from the WILLIS L. KING and her owner, and a moiety from the GEORGE D. DIXON and her owner (319-324).

The two following unrelated questions are presented:

First: Under the findings of fact made by the District Court, affirmed by the Circuit Court of Appeals, is the conclusion of the Circuit Court of Appeals that the Dixon was at fault correct?

Second: Are the intervening underwriters entitled to recover a moiety of cargo damage from the Great Lakes Transit Corporation, their named assured?

FIRST QUESTION.

Petitioner contends that the conclusion from the facts found, which of course is a conclusion of law (C. W. PATTERSON, (C.C.A. 2), 70 Fed. (2d) 712), that the Dixon was at fault, is erroneous. Following is a brief summary of the findings of fact which are fully set forth in the opinions of the Courts below.

Although the storm amounting almost to a cloudburst did not prevent the masters of the respective vessels from seeing the banks of the river, it was such as to make it impossible for them to see each other until just prior to the collision. When the King heard a fog signal from the Dixon she merely checked to half speed, did not reduce to bare steerageway, and therefore violated Rule 15 of the White Law (33 U.S.C.A. Secs. 241-293), prescribing Navigation Rules for the Great Lakes. Although the King blew three one-blast signals to each of which the Dixon responded, the King did not direct her course to starboard in conformance thereto, and therefore violated Rule 23 requiring that *in all weathers* a vessel blowing a one blast signal shall when necessary, accompany it by a corresponding alteration of her helm. The Dixon blew fog signals as required by Rule 14 and checked to bare steerageway as required by Rule 15, answered and conformed to the King's first one-blast signal in conformance to Rule 23 of the Navigation Rules of the Great Lakes. Rule 23 is as follows:

> "*In all weathers* every steam vessel under way in taking any course authorized or required by these rules shall indicate that course by the following signals on her whistle, to be accompanied whenever required by corresponding alteration of

> her helm; and every steam vessel receiving a signal from another shall promptly respond with the same signal, or, as provided in Rule Twenty-six: 'One blast to mean "I am directing my course to starboard." • • •'"

The District Court concluded that instead of answering the King's second blast signal with a like signal, the Dixon should have blown an alarm and stopped her way. The Circuit Court of Appeals concludes that the Dixon's only fault was in failing to blow an alarm in conformance with Pilot Rule II and Navigation Rule 26 (33 U.S.C.A., Sec. 291). Rule 26 is as follows:

> "If the pilot of a steam vessel to which a passing signal is sounded deems it unsafe to accept and assent to said signal, he shall not sound a cross signal; but in that case, and in every case where the pilot of one steamer fails to understand the course or intention of an approaching steamer, whether from signals being given or answered erroneously, or from other causes the pilot of such steamer so receiving the first passing signal, or the pilot so in doubt, shall sound several short and rapid blasts of the whistle; and if the vessels shall have approached within half a mile of each other both shall reduce their speed to bare steerageway, and, if necessary, stop and reverse."

Pilot Rule II is Supervising Inspectors Interpretation of Rule 26 and is in effect the same.

Taking up *seriatim* the clauses of Rule 26, we find that the Dixon did not blow a cross signal, nor did she fail to understand the course or intention of the King from signals being given or answered erroneously. She therefore did not violate these two clauses of the rule. We also find that Captain Goodberry was not in doubt from other causes as to the course and intention of the

King, for he answered each of her one-blast signals and ported his helm in conformance to his answer. The judicial decision here made is therefore not that there was any act done or omitted in direct infraction of any rule or statutory mandate, but that Captain Goodberry should have been in doubt as to the course and intentions of the King, because the King was still slightly (one-half point) to starboard of him when the second one-blast signal was sounded.

This rule has ordinarily to do with cases in which there is a failure to come to a passing agreement.

In THE GEORGE W. ROBY, a fog collision case (C.C.A. 6), 111 Fed. 601 at 609, the Court interpreted Rule 26 as follows:

> "Rule 26 is intended to apply to the ordinary circumstances of a *failure to come to an agreement as to passing before* coming within a half mile of each other. In such case the duty to reduce speed, and to stop and reverse, if necessary, is imposed, *regardless of fog* conditions, when the vessels come within the distance named by the statute". (Italics ours.)

In HAWGOOD TRANSIT CO., vs. MESABA SS. CO., (C.C.A.6) 166 Fed. 697, a fog collision case, there was no passing agreement. The Etruria was condemned for not stopping and blowing an alarm when she did not receive a reply to her passing signal, and the Stone was held in fault for failing to reply.

In PITTSBURGH SS. CO., vs. DULUTH SS. CO., (C.C.A.6), 222 Fed. 834, a fog collision case, there likewise was no passing agreement. The Empire City was

condemned for *failing* to respond to a one-blast signal, and the sonoma was condemned for not stopping and blowing an alarm when she did not *receive* a reply.

In THE NORTH STAR, 62 Fed. 71 (C.C.A.6), decided before the White Law was effective, both vessels were condemned for excessive speed. Neither vessel blew an alarm nor was there any suggestion that either had the obligation so to do.

In THE SAN SIMEON (C.C.A.2), 63 Fed. (2d) 798, not a fog case, the vessel was held in fault for not answering an *initial* two-blast signal with an alarm. The court stated that the failure to blow an alarm was not a fault within the letter of the rule, nevertheless it was within the spirit of the rule since the proposed navigation was "plainly impracticable" (801).

Giving full effect to the above five cases, which are the only ones cited by the Circuit Court of Appeals as authorities for holding the Dixon at fault, it will be found that condemnation has only been had under Rule 26 in cases in which there were no passing agreements before the vessels were within half a mile of each other, or a clear showing that a navigator was in fact or should be in doubt for the reason that the *proposed passing agreement was plainly impracticable.*

The Circuit Court of Appeals for the Sixth Circuit has judicially construed a one-blast signal to mean:

> "I am in control of the movements of my own vessel and of my consort, and am directing my course and that of my tow to the starboard, so that you may safely pass me on my port side, as you propose, provided you direct your course to star-

board far enough to leave me at a safe distance on your port side." (The F. W. Wheeler, 78 Fed. 824, at page 829.)

There were no cross signals, no confusion, nothing but an affirmation of the King's first one-blast signal, "I am directing my course to starboard." By this signal Captain Watts told Captain Goodberry as fully and as effectively as if he had been directly connected by telephone and had told him by the spoken word, that although somewhat delayed the King was then directing her course to starboard, that there would be safety for both vessels if the Dixon did likewise. It would seem that the conclusion that Captain Goodberry should have been in doubt, should be based upon a clear showing that the King did in fact port her helm but nevertheless the collision did occur, in other words that from the then situation of the vessels the agreed passing had become "plainly impracticable", and a new passing arrangement with all its attendant confusion and danger was necessary.

The answer to interrogatories (13) and the testimony of Captain Watts (78) are to the effect that the last helm action of the King before the Dixon appeared was to direct her course to port and not to starboard. There is no suggestion in any opinion that at the time of the second one-blast signal there would have been the slightest difficulty in conforming to the one-blast agreement then and theretofore made, had the King directed her course to starboard as she had twice indicated she would. Indeed, since at that time the vessels were almost half a mile apart it can be demonstrated to a certainty that had the King ported her helm as little as half a point, there would not have been

the slightest risk of collision. The decision, therefore, that the fact that the King was slightly on the starboard bow of the Dixon at the time of the second blast passing agreement, should have raised doubt in Captain Goodberry's mind as to the course and intention of the King, is a decision directly *contra* to the long established rule in the admiralty that the master of one vessel has the right to assume that a vessel he is meeting will comply with the rules and conform to her passing agreement.

THE VICTORY AND THE PLYMOTHIAN, 168 U. S. 410, 426.
SERVIA, 149 U. S. 144, 153.
LAKE ERIE TRANSP. CO. v. GILCHRIST TRANSP. CO., 142 Fed. 89 (CCA 6).
GREAT LAKES SS. CO. v. PITTSBURGH SS CO., 222 Fed. 862 (CCA 6).
THE BURLINGTON, 63 Fed. (2d) 781 (CCA. 2).
MARSDEN ON COLLISIONS AT SEA (8th Ed) 376.
THE DELAWARE, 161 U. S. 459.

In THE VICTORY AND THE PLYMOTHIAN, 168 U. S. 410, it was seen from the deck of the Plymothian for an appreciable time before collision that the Victory was not conforming to the rule to "keep to the right" nor did she answer the one-blast signal of the Plymothian. It was contended that the Plymothian should have appreciated the danger and had she done so collision would have been averted. The Supreme Court says:

> "Each of these vessels was entitled to presume that the other would act lawfully; would keep to her own side; if temporarily crowded out of her

course, would return to it as soon as possible; and that she would pursue the customary track of vessels in the channel, regulating her action so as to avoid danger." (426.)

The second one-blast signal, although heard slightly off the starboard bow of the Dixon and to the eastward of mid-channel, instead of creating a doubt in the mind of Captain Goodberry was assurance that the oncoming vessel, although delayed in carrying out the message of her first one-blast signal, would still perform her duty and direct her course to starboard, and that the vessels could pass in safety if the Dixon did likewise.

In THE DELAWARE, *supra*, this court said:

"If the master of the preferred steamer were at liberty to speculate upon the possibility, or even of the probability, of the approaching steamer failing to do her duty and keep out of his way, the certainty that the former will hold his course, upon which the latter has a right to rely, and which it is the very object of the rule to insure, would give place to doubts on the part of the master of the obligated steamer as to whether he would do so or not, and produce a timidity and feebleness of action on the part of both, which would bring about more collisions than it would prevent. Belden vs. Chase, 150 U. S. 674; The Highgate, 62 L. T. R. 841; S. C. 6 Asp. Mar. Law Cases, 512. • • •

"Until the last moment the tug had a right to assume that she would comply with the rule." 469.

The question of fault of the Dixon must be resolved from the viewpoint of Captain Goodberry on the bridge, not from the event. Captain Goodberry says he could see the Canadian bank of the river at all times,

and Captain Watts of the King (137) says he could see both banks of the river. With the banks as a guide, from Captain Goodberry's viewpoint there was not the slightest difficulty of the King conforming to her passing signal and he had a right to presume that she would. From his viewpoint the blowing of an alarm after passing agreement made and affirmed, which could have been carried out without the slightest difficulty had each vessel conformed to her signal, was unthinkable. It would have led to great and needless confusion since a new agreement would have to be made; and if the mandate of the rule was carried out each vessel would have had to stop and reverse and would be out of control. At the time of the second one-blast exchange the Dixon was proceeding at slow speed, swinging to starboard on a port wheel and breasting a two mile current. All single screw propellers back to port (84, 125), that is, their sterns cut to port and their bows go to starboard. In KNIGHT, MODERN SEAMANSHIP, 9th Ed. 366, the author has this to say:

> "A vessel drifting in a current and making no way through the water will usually fall athwart and end by drifting broadside on. This may be a serious danger."
>
> "A similar but still more pronounced tendency to fall athwart exists where a vessel which is making no way through the water is subjected to a breeze. A vessel so placed will almost always fall off and bring the wind abaft the beam."

Although the King claims to have been backing two minutes before collision and was backing at collision and her way was greatly retarded by the impact of her stem against the side of the Dixon, it was necessary for her to *back six minutes after collision*, in order

as Captain Watts puts it, to "keep in the vicinity of the Dixon" (64). It was of course impossible that she would have been able to stop in the brief three or four minutes which would have elapsed between the Dixon's proposed alarm and the meeting. If the Dixon did stop her way and the King conformed to her one blast signal as Captain Goodberry was obligated to assume that she would, from his viewpoint there would be grave danger of a collision arising out of the confusion of a broken agreement.

The suggestion (353) in the opinion of the Circuit Court of Appeals that because the Dixon was porting master of the Dixon might have apprehended from the position of the King's light that even though it was then on the port side, the King was not in position to pass safely, likewise does violence to the rule that navigation of the meeting vessels must be based upon the assumption that each is conforming to her passing agreement. The single flash in the storm of the cluster of electric lights upon the spar of the King, seen by the lookout off the port bow of the Dixon, was no indication of the direction in which the King was headed. In view of the fact, however, that this was the third time that the King had stated she was directing her course to starboard, from Captain Goodberry's viewpoint she had done so and it was full assurance that the vessels were passing well clear, since apprehension that she was not passing clear could only flow from the assumption that the messages of the three one-blast signals were false. It is submitted that this would have had to have been the working of Captain Goodberry's mind if the conclusion that the Dixon was at fault because she did not blow an alarm, is correct. "I appre-

ciate that the King has not and will not port although she has said and is saying that she has and will. I appreciate that although I do not see her and do not know that she is proceeding at a high and unlawful rate of speed, she must be doing so. Therefore I will stop and blow an alarm and allow my own vessel, out of control, to drift with the current." Surely such reasoning would have done violence to the authorities which hold that a navigator managing his boat in accordance with the rules and good seamanship, has a right to assume others will do likewise, and reverses the rule laid down by the Supreme Court in The VICTORY AND THE PLYMOTHIAN, *supra*, and in THE DELAWARE, *supra*.

Petitioner also contends that the Dixon performed the full measure of her duty when she reduced her way to such an extent that she could stop within the limits of visibility.

Irrespective of the direct command of the rules of navigation, and as a definition of cautious navigation and good seamanship, the Supreme Court has laid down the so-called "rule of sight" or "seeing distance". We quote:

> "It has been said by this court, in respect to steamers, that they are bound to reduce their speed to such a rate as will enable them to stop in time to avoid a collision after an approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law." (THE CHATTAHOOCHEE, 173 U. S. 540 at 548.)

The Dixon was complying with the "rule of sight". The King was not. Indeed, the Dixon proceeding at

bare steerageway, headed toward the shore and almost broadside to the current, was actually floating downstream away from the King at the current speed of two miles an hour at time of collision. It is rare indeed to find a fog collision case in which both vessels are traveling in the same direction at collision.

Research discloses no case where one vessel has been condemned for failing to supervise the navigation of another. We have examined every fog collision case on the Lakes, and have as yet to find one wherein it has been held that *after a passing agreement*, arrived at without confusion or dissent, a vessel proceeding as was the Dixon at such speed, as would permit her to comply with the "rule of sight", was condemned for failure to tell the other vessel by alarm that the latter was guilty of "bad navigation".

The gross fault rule is applicable to the case at bar.

In THE CITY OF NEW YORK, 147 U. S. 72, at 85, this court said:

> "Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor."

In their brief in the District Court, proctors for the King had this to say with respect to the claim of the Dixon that the King was blowing one-blast signals and did not conform thereto:

> "But one who accuses a master of steam vessels, holding a master's license unlimited from the United States Steamboat Inspection Service, who since 1910 has sailed as master and having property under his control of upward of a million dollars, of such an *inexcusable blunder*" (blowing a one blast signal and navigating as if he had blown two) "should have the burden of establishing the fact by very cogent proof."

The accusation has now been sustained by the District Court and affirmed by the Circuit Court of Appeals. There can be no doubt but that the King at half speed, having a two-mile current under foot and proceeding against her own accepted signal down the wrong side of the river where the upbound boat, not only by the accepted signal, but also under the custom prevailing for vessels to pass to the right in that stretch of water, (75, 120, 127) adequately accounts for the collision.

In THE VICTORY AND THE PLYMOTHIAN, 68 Fed. 395, the Circuit Court of Appeals divided the damages, stating:

> "We cannot find anything in the record which shows any precaution taken by the Plymothian when she saw the Victory disregarding her signal and obstinately pursuing her course." 399.

In the case at bar there was an agreement as to the method of passing. Although Captain Goodberry could not see, according to the courts below he was bound to appreciate that the message of the King's second one-blast signal was false. The Supreme Court, in holding the Plymothian free from fault, after stating that it would unhesitatingly apply the rule laid down in the *City of New York, supra,* and in *The Umbria,* 166 U. S. 404, continues:

> "Whether she may not have been slightly in fault may be a close question. This is often so

> when subsequent knowledge of what might have prevented disaster tends to qualify the inquiry as to the prior duty to avert it. But, after all, the question is, as pointed out by Mr. Justice McLean in Williamson v. Barrett, 13 How. 101, whether it was the duty of the master, in the exercise of due care and caution in the management of his vessel, to give a particular order. And on a careful consideration of the evidence, we think that the Plymothian was not bound to change her course, or to stop and reverse earlier than she did, and these are the only elements of fault imputed to her." (The Victory and Plymothian, 168 U. S. 410, 424.)

Much is made in both opinions below of the fact that the evidence that the King was slightly off the starboard bow of the Dixon at the time of the second two-blast signal, was given by the Lookout of the Dixon. In THE VICTORY AND THE PLYMOTHIAN, *supra*, THE UMBRIA, *supra*, and in THE MUNRIO, 11 Fed. (2d) 900, evidence of claimed bad navigation of the vessels exonerated under the gross fault rule likewise came from the respective crews of the vessels.

The Circuit Court of Appeals states "Had he (Captain Goodberry) observed either rule quoted above, *he might not have averted the collision but a danger signal would have put the King on its guard.*" The Dixon did not violate the mandate of any rule of navigation. Surely the Dixon's fault—believing the message of the second one-blast signal—was a minor fault, if a fault, at all. Under these circumstances, as we read the gross fault rule the King has the burden of proving that not only was the Dixon at fault but also that had she not been in fault the collision would not have occurred. The Circuit Court of Appeals has held that the King has not met this burden.

SECOND QUESTION.

The second question which the petitioner desires to have this Court review is as to the correctness of the decree that intervening underwriters recover back from the Transit Corporation the amount they have paid petitioner for cargo damage and expense.

The package freighters of the Transit Corporation, differing from bulk freighters, on each trip carry many hundreds of consignments of goods under through bills of lading, the transportation usually being initiated or terminated, and in many cases both initiated and terminated, by rail carriers. Under the Harter Act (46 U. S. C. A. 192), a vessel owner is exempted from liability for loss or damage resulting from faults or errors in navigation or management of the vessel, provided due diligence has been used to make the vessel seaworthy. Many years ago it was found to be more convenient and economical for water carriers to waive the saving provisions of the Harter Act, assume full liability for cargo damage, and cover its liability thus assumed by carrier's liability insurance.

Section 9 (e) (284) of the uniform bill of lading approved by the Interstate Commerce Commission, permitted this procedure. It is as follows:

> "If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this bill of lading."

The freight on the Dixon was moving under eleven tariffs issued by the Transit Corporation and rail carriers on whose lines the transportation initiated. These were not uniform. They were divided by the Circuit Court of Appeals into three classes (355, 356). Sufficient to say that in each of the three classes the Transit Corporation waived the saving provisions of the Harter Act and other defenses and therefore became liable to cargo owners for any cargo damage or expense, however caused or created.

The Transit Corporation in 1933 procured from the Atlantic Mutual Insurance Company and other intervening underwriters, insurance aggregating $1,100,000 (262) at a premium rate of 2.27% (269). Excess insurance was also permitted and procured (278). Since the Transit Corporation had waived the saving provisions of the Harter Act and assumed full liability to cargo owners following its usual practice of many years standing, it procured, if words mean anything, marine insurance against its (carrier's) liability to cargo owner. The policy provisions are set forth in the rider designated "First Interest" (275-279), the last clause of which provides that the rider is

> "to be regarded as substituted for those of the policy to which it is attached, the latter being hereby waived" (279).

By this form of special rider intervening underwriters agreed to and did:

> "Insure, lost or not lost, Great Lakes Transit Corporation for account of whom it may concern. Loss, if any, payable to Great Lakes Transit Corporation or order. At and from April 15, 1933 to midnight (Chicago time) December 12, 1933 • • • on cargo of any kind owned by the Assured and

on the *Assured's liability to others in respect of cargo of any kind covering* same from time said Great Lakes Transit Corporation becomes responsible therefor and until its responsibility ceases • • • and under and/or on deck on board of the Assured's steamers • • • George D. Dixon • • •, the Assured *taking upon themselves* as to said cargo, or parts thereof, all the risks, perils and liabilities which by law a common carrier by land or water assumes, and also the insurance of said cargo against perils of the seas and lakes, fire, jettisons, barratry, negligence of master or mariners, loss or damage arising through explosions howsoever or wheresoever occurring, bursting of boilers, breakage of shafts or through any latent defect in the machinery or hull, and all other acts, perils or misfortunes that have or shall come to the hurt, detriment, damage to or loss of the said cargo and undertake to *indemnify and hold harmless the said Assured* against hurt, detriment, damage to or loss of such cargo from any and all such risks, perils, acts or misfortunes, to the extent which the *Assured* may be held by the owners thereof, *under any liability the Assured shall have assumed as common carriers, insurers, or otherwise, and for any and all claims which said cargo may be called upon to contribute in General Average.* • • • *There shall, however, be deducted from the aggregate of all claims on each eastbound or westbound passage, the sum of $1,000.00.*" (Italics ours.)

The so-called marine insurance clauses, of which the above is a typical example, were adopted after and as the result of the Interstate Commerce Commission's decision in WYMAN, PARTRIDGE & CO. *et al*, vs. BOSTON & MAINE RR. *et al.*, 13 I. C. C. Rep. 258, 15 I. C. C. 577. Following is an excerpt from opinion in 13 I. C. C. Rep. 258:

"Without doubt these carriers might, if they saw fit, as already suggested, contract to indemnify the shipper against loss due to perils of the sea. In

such event the carrier itself would become the insurer and the shipper would require no additional insurance. It would be entirely immaterial to the shipper whether the carrier did or did not protect itself by insurance against possible loss."

The Transit Corporation did desire to insure. Mr. Winter, second Vice-President of the Atlantic Mutual Insurance Company, (intervening underwriter having the largest proportion of the risk) in his book entitled "Marine Insurance, its Principles and Practice", has the following to say with reference to the form of policies here involved.

> "There are also liability forms issued to common carriers under which the insurable interest is *not* cargo, but the liability, either imposed by law *or assumed by contract,* of the carriers for cargo in their custody." (p. 113) (Italics ours.)
>
> "The subject of insurance is not the property itself, but the liability of the carrier, whether this be implied by law or assumed by contract." (130.)

By this form of insurance cargo owners were better protected than they would have been had the Harter Act been not waived and they had procured their own cargo insurance, since they had the obligation of the responsible Transit Corporation which had insured its liability, a lien against the carrying ship, and also, in case of insolvency, in New York State, at least, the right to proceed directly against the Transit Corporation's liability underwriters.

> HINKLE v. GLOBE & RUTGERS FIRE INS. CO., 1935 American Maritime Cases, 1330, not otherwise reported, but Affirmed 246 App. Div. (NY) 737, and 271 N. Y. 585.

After the Dixon's loss, in due course the Transit Corporation paid cargo owners by its own check and for its own account their respective losses, and took receipts

therefor in its own name (267, Sched. E 295), prevented claims to underwriters and were duly reimbursed (267) less the deductible average of $1000. This reimbursement by underwriters was by check to the order of the Transit Corporation individually (266), not as bailee or trustee for cargo.

During the period from 1928-1933 inclusive, the Transit Corporation carried general cargoes pursuant to bills of lading in the form above referred to, and had procured identical insurance from the Atlantic Mutual Insurance Co. and other underwriters. During that period numerous losses occurred as a result of perils of the sea. The same procedure as outlined in the Dixon case had prevailed, and in each instance, after paying such losses, the Transit Corporation was duly reimbursed therefor, less the deductible average, by underwriters (267).

At the time the libel of the Interstate Steamship Company against the Transit Corporation was filed, January 23, 1934, the Transit Corporation had paid cargo claims to cargo owners shipping on the Dixon aggregating $22,338.57, an apportionment had been made by average adjusters (305) and the said amount less the deductible average of $1000 was shortly thereafter paid by intervening underwriters (265-266). Since all cargo claims had not been passed, approved and paid, when suit was started unpaid cargo owners had an action directly against the Steamer WILLLIS L. KING and the Interstate Steamship Company. For this reason the Transit Corporation brought suit as owner of the Steamer and as carrier and/or bailee of cargo, seeking in its own right to recover the amount which it had then paid for cargo damages and as carrier and bailee the amount not at that time paid. This appears

from the libel which contains the allegation that the Transit Corporation in "respect to the aforesaid damage to the Steamer DIXON, loss of earnings and use and expenses and *cargo loss and damage*, and as carrier and/or bailee of the said cargo, sustained damages amounting to $120,000.00" (20). In the stipulation of facts in which the so-called insurance question is presented, it is provided that when further claims in excess of the $22,338.57 referred to above, are received, approved and paid by the Great Lakes Transit Corporation, a further statement or statements will be made and payment will be made in like manner by the underwriters, that is, payment will be made by underwriters to the Transit Corporation (266) for the latter's own account. This has been done.

After the decision on the question of fault Messrs. Stanley & Gidley, who had theretofore been acting with proctors for libellant in suit against the King, filed an intervening petition in behalf of underwriters and alleged that the Atlantic Mutual had paid and would pay the sum of $6041.57 to the Transit Corporation for account cargo and was subrogated to the *rights of cargo owners* in that amount and would be subrogated in the amount of future payments which it would make (256). This of course was incorrect since as clearly appears by the rider provision quoted above, and as stated by Mr. Winter in his book referred to above:

> "The subject of the insurance is not the property itself but the liability of the carrier."

The Atlantic Mutual was and could be subrogated to the rights of its own assured, to wit, the Transit Corporation, and to no one else.

The prayer for relief in the intervening petition was that "The Court will be pleased to decree to your petitioner and against the Interstate Steamship Company and against the Steamer WILLIS L. KING * * * the sum of $6041.57" (257). There is no pleading in which intervening underwriters claimed or asked that the Transit Corporation should *repay* to intervening underwriters the amount the latter had then or would thereafter pay on account of cargo damage. The theory of the intervening underwriters was that although they were liable for, had paid and would pay the Transit Corporation the full amount of its liability for cargo loss and damage, they had a right to recover in full from the King and her owner the amount thus paid; and that they were not concerned with the fact that if such recovery in full was made the King could offset one-half of the amount thus paid in arriving at the collision damage under the doctrine of THE CHATTAHOOCHEE, 173 U. S. 540. They contended they had not insured the Great Lakes Transit Corporation against any loss it might sustain by reason of being obligated to contribute toward cargo damage in arriving at the single liability for which decree is given in the admiralty in case of mutual fault. THE NORTH STAR, 106 U. S. 17. Both the District Court (315-316) and the Circuit Court of Appeals (358) properly held that since all the parties were before the court, the Interstate Steamship Company having impleaded the Transit Corporation into the underwriters' proceeding, and the saving provisions of the Harter Act had been waived by the carrying vessel, each of the vessels were primarily liable for a moiety of the damage, and only in case the innocent party is unable to enforce payment of a full moiety from one of the vessels could the

deficiency be recovered from the other. THE ALABAMA AND THE GAMECOCK, 92 U. S. 695. With this holding, since no mistake of fact or fraud is claimed in pleading, proof or argument, the intervening petition should have been dismissed, since there was nothing whatsoever to support a recovery back of the moneys paid to the Transit Corporation by its own underwriters (either carrier's liability or cargo).

Judge West, in his opinion (315-316) directed that the decree should be for a moiety of cargo damage against each vessel, and that underwriters "are entitled to enforce the liability of the King and that of the Dixon, each for a moiety of the cargo loss." He directed, however, that the decree presented by the proctors for the Dixon should be entered. This he later retracts by a letter (316) and in a supplemental opinion (316-18) he concludes, as petitioner reads the opinion as follows:

1. That the tariffs providing "rates • • • include marine insurance" obligated the Transit Corporation to procure cargo policies, and this was not done.
2. That the policies actually issued cover the legal liability of the Transit Corporation in which coverage cargo owners have no insurable interest.
3. That coverage of the carriers legal liability is sufficiently broad to include the Transit Corporation's liability for failure to provide cargo insurance, and that as to this coverage cargo owners have an insurable interest.
4. That cargo owners were entitled to have the protection of cargo insurance as well as that of carriers common law liability, and the carrier having failed to procure cargo insurance could not by paying the loss out of its own funds, take away from underwriters the right of subrogation which they would have had had there been cargo insurance.

Again referring to Mr. Winter's book (p. 368) it will be found that the ordinary cargo policy usually contains a provision that cargo underwriters are not liable where the goods are in possession of a carrier "who may be liable for such loss or damage by law or *under an insured bill of lading or under a rate of freight that includes insurance*". It will also be found that the cargo policy to which the rider "First Interest" is attached does contain the identical words quoted above from Mr. Winter's book (Rec. 273). If the Transit Corporation had also procured the ordinary form of cargo policy payable not to itself but to cargo owners as their interests might appear, even if such policy did not contain the clause referred to above, nevertheless the ultimate liability would be with intervening underwriters. This for the reason that after paying cargo owners cargo underwriters would be subrogated to cargo owners rights, and since the saving clauses of the Harter Act were waived by the Transit Corporation such subrogated underwriters could recover in full from it. Having thus recovered, the Transit Corporation in turn could recover from its liability underwriters, the Atlantic Mutual and others, under the policy provision whereby underwriters agreed to indemnify the Transit Corporation to the extent to which it may be liable under any liability it "*shall have assumed as common carriers, insurers or otherwise*" (277). See GROSS v. N. Y. & TEXAS STEAMSHIP CO., 107 Fed. 516. Thus it will be seen that the second fund, cargo insurance, referred to by Judge West (318) deprived intervening underwriters of nothing.

The Circuit Court of Appeals states the question presented to be:

> "As to the second question, *i. e.*, whether the *cargo insurance* was payable to the owners of the Dixon as carrier, or as bailee or trustee of the cargo for the owners" (355) (Italics ours).

The only possible question is as to whether the Transit Corporation's carriers liability insurance policy also included a direct coverage on cargo, although the determination of this question was immaterial to the determination of any issue raised by the intervening petition and the answers thereto. The opinion of the Circuit Court of Appeals states that the Transit Corporations liability as a common carrier to cargo owners was absolute, being equivalent to that of an insurer (355), that the policies in suit were procured by the Transit Corporation in compliance with its contract to provide marine insurance, and issued *primarily* for the benefit of cargo owners. Assuming this to be so, surely there is no inconsistency in including cargo insurance—if cargo insurance there was—in the same policy with carriers liability insurance. The court then construes the policies as if they were *solely* (not primarily) for the benefit of cargo owners, and ignores, in effect elides, the broadest, clearest carriers liability coverage that could be drafted. The opening clause of the policy defined the specific nature of the coverage as "on the assured's (Transit Corporation's) liability to others with respect to cargo of any kind". Later it is provided:

> "The said Assurers" (Atlantic Mutual Insurance Co. *et al.*) "agree to indemnify said assured" (Great Lakes Transit Corporation) "to the extent to which the assured" (Transit Corporation) "may be held liable under any liability the assured" (Transit Corporation) "shall have assumed as *common Carriers, insurers, or otherwise.*" (Rec. 277) (Italics ours).

Although the Circuit Court of Appeals quotes the excerpt (357), the only comment it makes is "but this clause does not avail appellant because it did not take upon itself the insurance of cargo or any liability with reference thereto as an insurer" (358). It makes no comment upon the fact that the Transit Corporation had assumed the liability of a *common carrier* "equivalent to that of an insurer" (Opinion 355), and that the Atlantic Mutual in the above excerpt agreed to indemnify the Transit Corporation against its liability as a common carrier. Although immaterial, since indemnity against the Transit Corporation's liability as a "common carrier or otherwise" suffices, petitioner points out that in the WYMAN, PARTRIDGE case, *supra*, speaking of tariff provisions in so-called insured bills of lading, the Commission states that "in such event the carrier itself would become the *insurer* and the shipper would require no additional insurance." The policy is a contract between the Transit Corporation and underwriters. It recites that the *Transit Corporation* is taking upon itself as to said cargo, insurance thereof against the perils of the seas and lakes. Surely even if the Wyman Partridge case is wrong, the contract is not wholly ineffective because the liabilities which the parties had in contemplation and have so characterized in their agreement, is technically only "equivalent to that of an insurer" (355) and not that of an insurer.

Even assuming, which is almost impossible, that the policies are cargo insurance and nothing more, intervening underwriters are not entitled to recover back the moneys paid the Transit Corporation since such recovery would be contrary to the doctrine of WAGER vs. PROVIDENCE INSURANCE CO.,

150 U. S. 99. The opinion makes no mention of this case, which holds that where a cargo policy is payable to a named assured or order (in the case at bar the Transit Corporation) for account of whom it may concern, the underwriter is and cannot be subrogated to the rights of cargo owners since payment, as in the Wager case, to cargo owner by order of the named assured is in effect payment to such named assured, and such a payment *of course cannot be recovered back.* The case at bar, is much stronger as against the subrogation than is the Wager case, since the payments have been made to the named assured.

In conclusion upon this point, petitioner submits the result of the decision of the Circuit Court of Appeals is, to say the least, remarkable. For five years, from 1928 to 1933, inclusive, the Transit Corporation has assumed the liability "quivalent to that of an insurer" (Opinion C. C. A. 355) with respect to all cargo moved by it, and has paid large sums for premiums (in the year 1933 in excess of $25,000) for the $1,100,000 policies, which is but a part of like liability insurance. It has been paid by the Atlantic Mutual Insurance Company and other underwriters and has retained many thousands of dollars to reimburse it for payments made to cargo owners on account of losses which they had sustained. If the decision of the Circuit Court of Appeals be correct, the retention of such payments was wrong since such insurance was valueless—indeed worse than valueless since the Transit Corporation, relying upon its supposed liability insurance waived the saving clauses of the Harter Act which would have protected it from all cargo losses arising out of faults or errors in navigation or in the management of its

vessels. There are but few losses not in this category. but few losses not in this category. If these policies If these policies are nothing but cargo policies in which the Transit Corporation has no interest and is in no wise protected, *underwriters can recover back from the Transit Corporation* not only the payments made in the case at bar, but also all other payments made during the five years preceding 1934 that are not barred by the statute of limitations—surely an unhappy prospect.

What a farce comedy it all is under the decision of the Circuit Court of Appeals. A loss occurs; the Transit Corporation pays cargo owners the full amount of their losses; underwriters reimburse the Transit Corporation for the amount of such payments less $1000 deductible average and take a receipt therefor from the Transit Corporation as such, not as bailee or trustee for the cargo; then the final act: The Transit Corporation solemnly repays the amount received from underwriters, to-wit, the amount they had theretofore paid less $1000.00. Surely there is no reason for the $1000 deduction, which supposedly is the Transit Corporation's contribution to the loss, if as now held the ultimate result is that the Transit Corporation must stand the entire loss without reimbursement by underwriters. If the decree of the Circuit Court of Appeals be correct, this procedure must appertain, not to this case alone—loss arising out of mutual fault for collision—but to every conceivable cargo loss, from a peril of the sea, however caused. The unanswerable question is why the useless formality of underwriters paying at all, and why, having voluntarily paid, can they recover back in any event, especially under a

pleading that does not pray for a recovery back and does not allege fraud or mistake.

REASONS FOR ALLOWANCE OF THE WRIT:

1. Vessels owners on the Great Lakes are entitled to know whether their masters navigating their vessels in strict conformance to the statutory rules of navigation, have a right to proceed upon the assumption that other vessels they are meeting complying with such rules, or whether their masters must assume such other vessels are and will continue to be badly navigated, and act accordingly.

2. Under maritime conventions a number of the larger maritime nations of the world have adopted the rule assessing damages in marine collisions according to degree of fault. The United States is not a party to such conventions, but the result is in part attained by the gross fault rule. It is important to maritime interests of this country to know whether the gross fault rule will be liberally applied, as it was not in the case at bar.

3. As will be seen from Schedules C-1 to 11 (285) merchandise shipped on the Dixon alone moved under eleven tariffs having to do with shipments made under so-called insured bills of lading. The Dixon was but one of twenty-two vessels (276) operated by the Transit Corporation, all likewise insured. Van Ummersen Tariffs (Schedule C-9, Rec. 219) were filed in behalf of fourteen water transportation carriers operating on the Great Lakes. This does not include the Transit Corporation. Insurance on the Dixon's cargo was written by fourteen insurance companies, six

American and eight (including Lloyds), English (259). It was stipulated in effect that the legal determination with respect to the Atlantic Mutual's claim should stand as a determination with respect to each of the interested underwriters (260). It is of course of great importance not only to water carriers on the lakes, canals (Sched. C-3, Rec. 287) and on the ocean, who issue like tariffs, but also to the rail carriers (Sched. C-8, Central Freight Association, Rec. 290; Sched. C-10, Trunk Lines, Rec. 292), with whom the water carriers participate in through rates, as to whether policies in the form and having the coverage of the policies issued by the fourteen underwriters to the Transit Corporation did in fact insure such water carriers against the liability which they have assumed in waiving the saving provisions of the Harter Act. It is also of great importance to underwriters to know whether the policies they have been issuing do provide the indemnity which the water carriers desire.

We submit that the decision of the Circuit Court of Appeals is wrong and should be reviewed by this Court.

WHEREFORE, your petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, demanding that Court to certify and to send to this Court for its review and determination on a day certain, to be therein named, the full and complete transcript of the record and of all proceedings in the cases numbered on its docket 6911, Admiralty, entitled Great Lakes Transit Corporation, Libellant, Respondent and Impleaded Respondent-Appellant, vs. Interstate Steamship Com-

pany, Libellant, Respondent-Appellee, John Milko, Intervening Libellant, Appellee, and Atlantic Mutual Insurance Company, *et al.*, intervening underwriters, and that said decree of the United States Circuit Court of Appeals for the Sixth Circuit may be reversed by this Honorable Court as herein prayed for, and that your petitioner may have such other and further relief as to this Honorable Court may seem meet and just, and your petitioner will ever pray.

GREAT LAKES TRANSIT CORPORATION,
By: LAURENCE E. COFFEY,
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

GREAT LAKES TRANSIT CORPORATION,
Petitioner,

vs.

INTERSTATE STEAMSHIP COMPANY
and
ATLANTIC MUTUAL INSURANCE COMPANY, *et al.*, Intervening Underwriters,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The facts are stated in the petition. The suit is within the admiralty and maritime jurisdiction of the United States and of this Honorable Court. Jurisdiction of this Court is invoked under Title 28, Chapter 9, Sec. 347 of the United States Code, and under Article 3, Sec. 2 of the Constitution of the United States.

Specifications of Error.

The Circuit Court of Appeals erred:

1. In concluding that the master of the Dixon was guilty of negligence for not being in doubt with respect to the navigation of the King at the time the latter blew her second one-blast signal.

2. In not holding that the Dixon, having complied with the rule of sight, was free from fault under the facts as found by the courts below.

3. In not applying the gross fault rule to the case at bar.

4. In not holding that the policies procured insured the Transit Corporation's liability to cargo owners and thus fulfilled its obligation under tariff provisions, and even if it did not fulfill such obligations such failure will not permit intervening underwriters to recover back any part of the moneys paid the Transit Corporation on account of its carriers liability which they had insured.

5. In not holding that the Transit Corporation, being actually and in terms the party insured by intervening underwriters policies, such underwriters can have no right of recovery against the Transit Corporation even if it be assumed that cargo owners were also entitled to the benefit of insurance.

POINT I.

The Circuit Court of Appeals erred in concluding that the Master of the DIXON was guilty of negligence for not being in doubt with respect to the navigation of the KING at the time the latter blew her second one-blast signal.

This case is far and away beyond any adjudicated case in holding the Dixon in contributory fault. Research has disclosed no case in which a vessel has been condemned under Rule 26 unless (a) she has failed to answer a signal blown or failed to blow an alarm when she has received no response to her signal, (b) her

master has not been in fact in doubt as to the intentions of the other vessel, or (c) the passing proposed has been plainly impracticable.

In THE WILLIS L. KING, 285 Fed. 744, the court found that the master of the Superior City, had rung electric alarm bells warning the crew of danger so long before he blew his alarm that there was time for all of them to get on deck, and that this proved conclusively that for some time before he acted he *was in fact in doubt* as to the course and intention of the King.

In THE FOUNTAIN CITY, 62 Fed. 87, Judge Taft, writing for the Circuit Court of Appeals, says:

> "The lookout also says that the captain came running on to the deck.
>
> "It is very clear from this evidence that the failure of the Fountain City to reply to the third signal carried doubt as to her course to the minds of the mate, the captain and the lookout." (p. 92.)

In THE QUOQUE, 47 Fed. (2d) 873 (C. C. A. 2), twice cited in the opinion of the District Court (250, 252), the Quoque had improperly twice crossed the passing signals of the Tug Transfer No. 12. The Court held that by blowing an alarm the master of the Transfer showed that he realized there was danger, therefore he should have immediately stopped and backed.

If instead of blowing the second one-blast signal the King had blown a two-blast signal and at that time the Dixon had answered with an alarm but had not stopped, this case would have been identical with that

of the Quoque and the court could have justly concluded that Captain Goodberry was in fact in doubt as was conclusively shown by his alarm.

In THE GEORGE L. GARLICK, 91 Fed. 920, the court has the following to say with respect to the obligation of meeting vessels which have a passing agreement.

> "When one vessel has dictated the maneuver, and the other vessel has adopted and done her part to execute it, the facts should be clear, before the court should hold that the maneuver should have been interrupted, in the course of its fulfillment, because the vessel that initiated the movement failed to do her part. When a vessel is doing right, it is not always easy to determine nicely when the opposite vessel is doing wrong, and whether she will in time correct her error, and at just what time the unoffending vessel should undertake to counteract the wrong." (pp. 926, 927.)

POINT II.

The Circuit Court of Appeals erred in not holding that the DIXON, having complied with the "rule of sight", was free from fault under the facts found by the Courts below.

Further authorities on the "rule of sight" are the following:

THE NACOOCHEE, 137 U. S. 330,
THE SADOCK, 9 Prob. Div. 116,
The COLORADA, 91 U. S. 692,
THE MARTELLO, 153 U. S. 64, 70.

Neither in the International Rules nor the Inland Rules of Navigation are passing signals permitted in a fog. (International Rules, Art. 28, 33 U. S. C. A. Sec.

113; Inland Rules Art. 18, Rule IX, 33 U. S. C. A., Sec. 203) while the Lake Rules require passing signals *in all weathers* (Rule 23, *supra*). For this reason the ocean and inland cases have little bearing upon the question presented.

Following is a tabulation of all lake fog collision cases reported which petitioner can find and the reasons for decision. It will be seen that after a proper passing arranged in no case was a vessel held in fault for failing to blow an alarm.

In THE NEGAUNEE, 20 Fed. 918, collision was held to be due to inevitable accident.

In THE ALBERTA, 23 Fed. 807, both vessels were held at fault for excessive speed. One was proceeding at ten miles an hour and the other at six.

In THE PESHTIGO, 25 Fed. 488, the condemning fault was the failure of a barge to sound her fog horn.

In THE OREGON, 27 Fed. 751, excessive speed was the condemning fault.

In BRADLEY v. THE JOHN PRIDGEON, JR., 38 Fed. 261, the Pridgeon was held solely at fault for having a careless and incompetent lookout.

In HOOD v. THE LEHIGH, 43 Fed. 597, both vessels were condemned, the steamer for excessive speed and the schooner for failure to show a torch.

In THE NORTH STAR, 62 Fed. 71 (CCA 6) the Sheffield was guilty for mistaking the signal of the

other vessel and the North Star for failing to stop and back after a cross signal.

In THE FOUNTAIN CITY, 62 Fed. 87 one vessel was held in fault for changing to a two-blast agreement after a one-blast agreement had already been made, and her master was in fact in doubt as to the position of the oncoming vessel. The other vessel was held in fault for not stopping and reversing when her signal was not answered.

In THE ARTHUR ORR, 69 Fed. 305, both vessels were held in fault for excessive speed.

In THE NORTHERN QUEEN, 117 Fed. 906 (C. C. A. 6) the Northern Queen was held solely at fault for excessive speed.

In ERIE & WESTERN TRANSIT CO. v. THE CITY OF CHICAGO, 178 Fed. 42 (CCA 7), the City of Chicago was held solely at fault for not giving warning by sound of the presence of a crib struck by a steamer.

In THE EMPIRE CITY, 222 Fed. 834, (CCA 6) the Empire City was at fault for being on the wrong side of the channel and having an inattentive lookout, and the Sonoma was at fault for proceeding after failing to secure an answer to her passing signal.

In THE W. H. GILBERT, 232 Fed. 547 (CCA 6) the Gilbert was held solely at fault for failing to hear the fog bell of an anchored vessel.

In THE J. J. HILL, 260 Fed. 655 (CCA 8) it was held that the Panther, which was the only vessel which

sustained damage failed to prove by preponderance of the evidence any fault of the other vessel contributing to the collision when it was shown that such other vessel had reduced to steerage way.

In THE MARTIN MULLEN, 260 Fed. 916 (CCA 6), both vessels were condemned for excessive speed.

POINT III.

The Circuit Court of Appeals erred in not applying the gross fault rule to the case at bar.

In THE UMBRIA, 166 U. S. 404, the gross fault rule was held applicable, although the Iberia changed her course and the Supreme Court indicated that under the navigation rules there effective, change of course was ordinarily not justified, which is the fact as shown by the following cases:

THE ALBERTA, 23 Fed. 807, 811.
THE ATLANTA, 26 Fed. 456, 461.
THE WYANOKE, 40 Fed. 702, 704.

In THE MUNRIO, 11 Fed. (2d) 900, the vessel changed her course without sanction of rule and did not stop and back until collision was unavoidable. Nevertheless the court applied the gross fault rule, stating:

> "No contention is made that the Munrio committed any act specifically prohibited by the International Rules, or that she failed to do any act made mandatory by them. On the other hand, full speed in a fog, in known proximity to another vessel, is so gross a fault that the Munrio's negligence must be made very clear before she will be condemned. The Umbria, *supra*." 903.

In the case at bar as in the above case, there is no finding that the Dixon committed any act specifically prohibited by the rules or that she failed to do any act made mandatory by them, her sole fault being that her master was not in doubt at a time when the Court was of the opinion that he should have b[illegible]n.

As stated in THE STIMSON, 257 Fed. 762, authorities to sustain the gross fault rule might be cited almost without number.

POINT IV.

The Court erred in not holding that the policies procured insured the transit corporation's liability to cargo owners and thus fulfilled its obligation under tariff provisions, and even if it did not fulfill such obligations such failure will not permit intervening underwriters to recover back any part of the moneys paid the Transit Corporation on account of its carriers liability which they had insured.

Both courts below held that the various tariff provisions obligated the Transit Corporation to procure policies of cargo insurance. The cases hold otherwise.

In WYMAN, PARTRIDGE, *et al.* vs. BOSTON & MAINE RR. *et al.*, speaking of like tariff provisions, the Interstate Commerce Commission in 13 I. C. C. of Rep. 258, says:

> "In such event the carrier itself would become the insurer and the shipper would require no additional insurance. It would be entirely imma-

terial to the shipper if the carrier did or did not protect itself by insurance against possible loss."

In HILL vs. SCOTT, (1895) 2 Q. B. 371 (affirmed by the Court of Appeals on the opinion below L. R. (1895) 2 Q. B. 713) the carrier charged a through rate covering all expenses, including insurance. It was held that notwithstanding a prior course of dealing in which the carrier awaited collection from underwriters before remitting to cargo underwriters, the carrier was liable. The Court states, page 378:

"The insurance was effected by the defendant for his own protection"

and

"There was nothing remarkable in the shipowner insuring himself, especially where there was no bill of lading exception."

In SOUTHERN COTTON OIL CO vs. MERCHANTS & MINERS TRANSP. CO., 179 Fed. 133, the bill of lading provided that the freight was covered by marine insurance in accordance with and subject to the conditions and limitations of policies of marine insurance held by the carrier. After holding that the policies were not direct insurance on the goods but only reinsurance, Judge Learned Hand held the obligation of the carrier under the bill of lading provision was

"to pay the shipper's loss under the same contingencies as permitted him through his own reinsurance to throw the loss upon his own insurers. This I do not think was *ultra vires* a carrying corporation and did not constitute doing an independent insurance business."

In GROSS vs. NEW YORK & TEXAS SS. CO., 107 Fed. 516, the carrier agreed to "cover the shipowner with marine insurance from Galveston northward". Both the shipper and carrier had insurance. It was concluded that the effect of the clause was to make the carrier liable, and therefore *his* underwriters liable.

Even though the carrier's liability policy procured did not satisfy the tariff obligation, since cargo owners have been paid in full they are in no wise concerned. Such failure surely would not permit intervening underwriters to recover back the moneys they had paid to reimburse the Transit Corporation for its liability as a *common carrier*, insurer or *otherwise* which it had assumed and underwriters had insured. The reasoning of the Circuit Court of Appeals seems to be to construe tariff provisions obligating the Transit Corporation to obtain marine insurance as not permitting it to procure any other than cargo insurance, and ignores the provision of the policy covering carriers liability.

POINT V.

The Circuit Court of Appeals erred in not holding that the Transit Corporation, being actually and in terms the party insured by intervening underwriters policies, such underwriters can have no right of recovery against the Transit Corporation even if it be assumed that cargo owners were also entitled to the benefit of insurance.

As stated above, the policy covered the assured's liability to others, being of course the liability which the Transit Corporation had assumed by reason of its

waiver of the Harter Act and of all other defenses. That the insured meant "Transit Corporation" wherever used, and not cargo owners, conclusively appears when attempt is made to substitute "cargo owner" for "Transit Corporation" in any clause in the policy. Thus

> "Upon any charges of the Assured upon any and all cargo • • • from the time the Assured becomes responsible for such cargo" (275).
>
> "The Assured will not assume responsibilty for marine perils in connection with such (iron ore and grain in bulk) shipments • • •" (278).
>
> "The Assured will report to these underwriters the total number of tons • • • carried by them."
>
> "The Assured shall report • • • the amount of grain held in their vessels for winter storage" (279).

The Circuit Court of Appeals has held that the insurance was *cargo* insurance payable to the owners of the Dixon not as carrier but as bailee or trustee of the cargo for the owners (355). The error in such holding is illustrated by substituting in the following clause for the "assured", the party for whom the court holds the Transit Corporation was acting as Trustee:

> "The cargo owners taking upon themselves as to said cargo or parts thereof, the insurance of said cargo against perils of the seas and lakes and the said assurers agree and undertake to indemnify said cargo owners to the extent to which the cargo owners may be held liable by the cargo owners under any liability which the cargo owners shall have assumed as common carriers, insurers or otherwise."

Even if it be assumed that these policies were for the benefit of cargo owners and directly enforcible by them,

as persons in some manner covered by the phrase "for account of whom it may concern", intervening underwriters would have no right to subrogation against their named assured, the Transit Corporation.

The case would then come squarely within the doctrine of WAGER v. PROVIDENCE INS. CO., 150 U. S. 99. There, open policies had been issued to Morse & Co. *"for account of whom it may concern"*. Morse & Co. had assumed the obligations of a carrier. Certificates of insurance under these open policies were issued to the cargo owner, and after a loss had occurred for which the carrier was liable, the insurance company paid the amount of the policy to the cargo owner. The insurance company then brought suit against Morse & Co. and against Wager, master of the vessel, to recover the amount so paid. The Supreme Court held:

> "It would seem to be clear that where the carrier is actually and in terms the party insured, the underwriter can have no right to recover over against the carrier, even if the amount of the policy has been paid by the insurance company to the owner on the order of the carrier • • •. H. Morse & Co. were, nominally at least, the parties insured and came within the terms of the policy, and upon a loss, were entitled to receive the amount of the policy, and of course, in that event, the insurers could not, after having paid H. Morse & Co. the amount of the loss, recover it back from them under the principle of equitable subrogation."

The Court then found that no different conclusion should be reached because of the fact that the insurance companies paid the amount of the loss directly to the cargo owners. In the *Wager* case, the bills of lading did not contain any provision giving the carrier

the benefit of the shipper's insurance (the first headnote to that case being misleading) and in every respect to decision is in point on the issues here involved.

To the same effect as the Wager case are:

THE JOHN RUSSELL, 68 Fed. (2d) 901;

SORENSON vs. BOSTON INS. CO., 20 Fed. (2d) 640;

GROSS vs. NEW YORK & TEXAS SS. CO., *supra* (page 521 of 107 Fed.)

and see discussion in

PHOENIX INS. CO. vs. ERIE & WESTERN TRANSP. CO., 117 U. S. 312, at pp. 320-325.

In the case of LOWERY v. CONNECTICUT FIRE INS. CO., 70 Fed. (2d) 324, cited by Judge West in his supplemental opinion, the question was as to whether a vessel owner not named in a liability policy was entitled to the benefit of insurance issued in the name of the charterer, who was the carrier of the cargo. The obligation of the underwriters to indemnify the carrier, named as the assured in their policies, was admitted.

In Conclusion on the Insurance Question.

Underwriters intervened in the consolidated suits to present one question and one question only—their right to a decree against the King for full cargo damages. They realized that by policy provisions they were obligated to indemnify the Transit Corporation for its carriers liability to cargo owners, and they made their payments to the Transit Corporation individually, not as trustee or bailee for cargo, to satisfy such obliga-

tion. Their petition neither in stating part or prayer for relief alleges that they are entitled to recover back anything from the Transit Corporation. THE ALABAMA AND THE GAMECOCK, 92 U. S. 695; THE VIRGINIA EHRMAN, 97 U. S. 309; CITY OF HARTFORD, 97 U. S. 323, and other like cases it was decided that each vessel in fault was liable for a moiety of the cargo damage. With this decision the claim of intervening underwriters, departed from this case since no one denies that subrogated to the rights of the Transit Corporation it would be entitled to recover the moiety of cargo damage payable by the King and no more.

Both courts below concluded that "marine insurance" required by tariffs could mean but one thing only, to wit, direct insurance on the cargo. Although petitioner submits this was erroneous, it is immaterial. There was nothing to prevent the Transit Corporation from purchasing a double coverage—cargo insurance and carriers liability. If, as held by the Court of Appeals, the policies were in fact cargo policies, this does not preclude them from being also carriers liability policies, nor does it permit the court to elide the carriers liability clauses. If although contrary to the doctrine of the Wager case, the court decides that as a cargo policy underwriters are subrogated to the rights of the cargo owners and can recover from their named assured a moiety of cargo damage, surely this does not preclude the court from holding that as a carriers liability policy they must reimburse the assured for the liability it assumed as a common carrier, nor does it permit the court to direct that *without demand therefor* underwriters shall recover back from the Transit Corporation a moiety of the amount which underwriters had paid to satisfy their carriers liability coverage.

Upon any proper construction of the policies in connection with the facts as stipulated, there is no justification for the decree directing that a moiety of the cargo damage shall be paid back by the Transit Corporation to the underwriters who have never requested such payment back.

THE DECREE OF THE CIRCUIT COURT OF APPEALS SHOULD BE REVERSED.

BROWN, ELY & RICHARDS,
Proctors for Great Lakes Transit Corporation, Petitioner.

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Supreme Court of the United States

October Term, 1936.

No. 716.

GREAT LAKES TRANSIT CORPORATION,
Petitioner,

against

INTERSTATE STEAMSHIP COMPANY and ATLANTIC MUTUAL INSURANCE COMPANY, *ET AL.*, Intervening Underwriters.

BRIEF FOR PETITIONER.

This case comes before this Court on writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit, granted March 8, 1937 (R. 142).

Petitioner sought to review the decree of the Circuit Court of Appeals made on June 5, 1936 (R. 123) affirming the interlocutory decree of the United States District Court for the Northern District of Ohio, Eastern Division, in admiralty, made on July 27, 1934, adjudging first, that the petitioner's Steamer "George D. Dixon", and the Interstate Steamship Company's Steamer "Willis L. King", were both in fault for a collision in the St. Clair River on August 11, 1933, and second, that the Atlantic Mutual Insurance Company and other intervening underwriters having paid and agreed to pay petitioner, under insurance policies which they had issued, the amount of cargo loss and damage

(less a deductible average of $1000) arising out of such collision (R. 53), were entitled to recover back from Petitioner a moiety of such damages (R. 111-12). In allowing the writ this Court limited its review to the second question referred to above (R. 142).

Opinions Below.

The opinions of the District Court, three in number, two having to do with the question to be reviewed (R. 104-108), are not officially reported. The opinion of the Circuit Court of Appeals (R. 123-34) is officially reported as "Great Lakes Transit Corporation v. Interstate Steamship Company (Milko, *et al.* interveners), 86 F. (2d) 740, Advance Sheets, Feb. 1, 1937." There was no opinion on the application for reargument (R. 142).

Nature of the Proceedings.

The Interstate Steamship Company filed its libel against Petitioner *in personam* in the United States District Court for the Northern District of Ohio, Eastern Division. Petitioner, as owner of the "Dixon" and as carrier and/or bailee of the cargo laden thereon, filed its libel *in rem* against the Steamer "Willis L. King" and *in personam* against the Interstate Steamship company (R. 10-15). The Interstate Steamship Company, under the 56th Rule in Admiralty, brought petitioner into the suit which it had brought as owner of the "Dixon" and as carrier and/or bailee of cargo, to answer, as *owner*, petitioner's claim for cargo damage (R. 20-23). The requisite answers were filed, the suits were consolidated, and the decision was mutual

fault. After the decision the Atlantic Mutual Insurance Company intervened in the consolidated cause, claiming to be subrogated to the rights of owners, shippers and consignees of cargo on the "Dixon" (R. 45), asking that the Interstate Steamship Company and Great Lakes Transit Corporation answer its petition, and praying for a recovery in full from the "King" of the cargo loss and damage which it had then paid and would thereafter pay (R. 46). The Interstate Steamship Company answered the petition, setting up the decision of mutual fault, and praying that its rights be preserved (R. 101-4). The Transit Corporation also answered, denying that the Atlantic Mutual Insurance Company was subrogated to the rights of cargo owners (R. 97, 98), and alleging that if the collision was due to mutual fault, the cargo damages should be equally divided and a full recovery against the "King" would be contrary to the rights of the parties (R. 100-101). The question presented on this review arises out of the issues made by the intervening petition of underwriters and the answer of the Transit Corporation thereto.

The Atlantic Mutual Insurance Company had insured 30% of the risk with respect to cargo, and it was stipulated that its petition should stand as the petition of underwriters, fourteen in number, insuring the remaining 70% (R. 46-9).

Jurisdiction.

The jurisdiction of this Court is based on Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C., Title 28, Sec. 347) and on Article III, Section 2, Clause I of the Constitution of the United States.

The Issues Involved.

On the question here to be reviewed the only issues presented by the pleadings and in the argument in the District Court were first, whether intervening underwriters were subrogated to the rights of cargo owners whose property had been lost and damaged, and second, as to whether, if subrogated, they were entitled to recover cargo damage *in full* from the Steamer "*King*" and her owner. The same questions are here presented and, although the issue is not tendered by the intervening petition or presented by the answers thereto, in addition the question as to the correctness of the decree that intervening underwriters can *recover back* from petitioner a moiety of the moneys they have paid it with respect to cargo loss and damage.

Statement of the Stipulated Facts and the History of the So-called Marine Insurance Clauses Contained in Petitioner's Tariffs.

Petitioner is a common carrier by water under the jurisdiction of the Interstate Commerce Commission, participating in through rates with rail and canal carriers and issuing the "Uniform Bill of Lading". Its freight vessels, some twenty in number, engaged in carrying cargoes of miscellaneous freight, are known as package freighters, as differentiated from bulk freight carriers which carry iron ore, grain, coal, stone and other like commodities. On each trip each vessel carries many hundreds of consignments of goods, the transportation usually being initiated or terminated, and in many cases both initiated and terminated, by rail carriers. As long ago as 1907 owners of package

freighters sought to take out a blanket insurance coverage on all cargo carried and include the cost of such insurance in the freight rate. In 1908 the Interstate Commerce Commission had for consideration the propriety of advance in freight rates on the Great Lakes to cover the increase cost of the so-called "insured bills of lading."

Wyman, Partridge, etc. vs. Boston & Maine R. R., (XIII I. C. C. Rep. 258).

The Commission had the following to say with respect to the practice proposed:

> "If the shipper obtained through this insurance taken out by the carrier proper protection without material increase of expense to him, we think the present arrangement would be better than the old practice under which each shipper procured his own insurance." (262.)

The Commission then decided that the end to be attained—protection of the shipper—could best be attained by the carrier assuming full liability for losses due to perils of the seas or other causes and not by direct insurance on cargo, stating:

> "When the shipper himself effects his own marine insurance he receives a policy which states the terms and conditions upon which that insurance is placed. If a loss is not paid he has a contract upon which he can bring suit and he may select such insurance company that this suit can be brought in the state of his residence.
>
> "There is the greatest uncertainty just what protection the shipper secures under the arrangement which is attacked by this proceeding. The rate is a joint through rate applicable over both the rail and the water line. Undoubtedly, these carriers might, if they saw fit, issue bills of lading which would make them responsible for loss by

peril of the sea. Under such a contract for transportation the carrier would stand responsible for a loss upon the water, *would thereby acquire an insurable interest in the goods as against such loss, and might take out marine insurance for its own benefit.* In case of loss it would be liable to the shipper and would look for indemnity to the insurance company." (Italics ours.) (262.)

"But such is not the contract which these defendants make with their shippers. As already said, they may exempt themselves from these perils of the sea which are not due to their own negligence, and without exception they do this by the terms of the bills of lading which are issued. They are not, therefore, liable as common carriers for loss upon the water not due to the negligence of the water carrier. What they undertake to do is to procure insurance which shall indemnify *not the carrier but the shipper* against such loss. (Italics ours.)

"The testimony does not show clearly what contract of insurance is executed. It seems to be a general policy upon the cargo for the benefit of whosoever may be interested. The name of no shipper is specified, the value of no invoice is known, the value of the entire cargo is not known and cannot be known. The shipper has no information as to the company in which the insurance has been placed, nor as to the nature of the policy which has been taken out, nor as to the conditions which he must perform in order to perfect his claim in the event of loss. If loss occurs he knows not whom to sue nor where to sue, and the company may be one upon whom no service can be obtained without going into some foreign jurisdiction at great expense.

"We do not feel that shippers should be forced to rely upon this sort of an undertaking for protection. Without doubt these carriers might, if they saw fit, as already suggested, contract to indemnify the shipper against loss due to perils of the sea. *In such event the carrier itself would become the insurer and the shipper would require no*

additional insurance. It would be entirely immaterial to the shipper whether the carrier did or did not protect itself by insurance against possible loss. This kind of rate these carriers might have established and they might with propriety have made a somewhat higher charge than was imposed under the old tariff where the shipper himself was obliged to incur the expense of this marine insurance." (Italics ours.) (263.)

In conclusion the Commission stated:

"An order will then be issued putting in the reduced rates above named, unless the defendants have previously tendered a contract of shipment under which the shipper receives the same protection which he has formerly had under his policy of marine insurance, and make the necessary changes in their tariffs, if any are required." (265.)

The case again came before the Commission in March 1909 (XV, I. C. C. 577). In pursuance of the suggestion made in the earlier case the carriers had submitted certain tariff and bill of lading provisions, which were the subject of consideration. The Commission decided that there should be incorporated in the tariffs issued for lake and rail movement, the following clause:

"While shipments carried under this tariff are water borne at and between lake ports on the vessels of a lake line party hereto, the lake carrier and the rail carrier delivering the property to the lake carrier jointly and severally assume liability for loss or damage to said shipments caused by marine perils, to wit, of the seas and lakes, fire, collision, stranding, jettisons, pirates, assailing thieves, barratry of the master or marines, and all other perils or misfortunes that have or shall come to the hurt or damage of said property or any part thereof, including general average charges and expenses for which the owner may under

> the maritime law be chargeable, but excluding the risks of riots, war, or insurrection; any loss from said marine perils for which the lake line or the rail line is liable hereunder to be paid sixty days after proof of loss and proof of interest in said property are furnished said company." (581.)

By Sections (a), (b), and (c) of Section 9 of the Uniform Bill of Lading, (R. 75-76) a water carrier is given the benefit of the Limited Liability Acts (46 U. S. C., Sec. 182-188), and of the Harter Act (46 U. S. C., Secs. 190-5) whereby a vessel owner using due diligence to make his vessel seaworthy is not responsible for faults or errors in navigation or management of the vessel, and is exempted from liability for damage due to latent defects, etc. In order to make effective its directions with respect to tariffs of lake carriers issuing insured bills of lading, the Commission directed that a new clause should be added to the uniform bill of lading. This clause, in the same verbiage as directed by the Commission in 1909 (XV, I. C. C. at 582), is now Section 9 (e), and is as follows:

> "If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the provisions of the tariff, which shall be treated as incorporated into the conditions of this bill of lading." (R. 76-7.)

In 1910 the *Wyman, Partridge* case came before the Commission for the third time (XIX, I. C. C. 551). Wyman, Partridge & Co. sought reparation in the amount of the premiums they had paid directly for cargo insurance during the lake navigation season of

1907, claiming such insurance was necessary for the reason that the cargo policies taken out by the lake carriers (the cost of which was included in the freight rate), did not afford adequate protection. Reparation was granted.

The lost and damaged cargo on the "Dixon" was moving under ten tariffs, four of which (C3, C7, C10 and C11), (R. 79, 82, 84, 85),—three headed "Marine Insurance" and one headed "Governing Marine Insurance on Rail and Lake traffic"—contained the identical words of the clause quoted above, directed by the *Wyman, Partridge* case. Four more (C2, C4, C5 and C8) (R. 78-80, 82) are in legal effect the same although not in identical verbiage and not containing the provision "that the lake carrier and the rail carrier delivering the property to the lake carrier jointly assume liability" etc. One, of the four last mentioned, (C4), was a joint canal and lake tariff in which both the canal and the lake carriers assumed liability. Since the Carmack amendment (49 U. S. Code, Sec. 20, sub. 11), the recital that the rail carrier, (if the initial carrier) delivering the property assumed liability, would be surplusage. The two remaining tariffs (C6 and C9) (R. 81, 83) provide that the property moving under rates, which include marine insurance, "is insured against the perils of the seas," etc. Giving effect to the *Wyman, Partridge* case (XIII, I. C. C. 258) under the two tariffs last mentioned the petitioner itself was the insurer. Neither the District Court nor the Circuit Court of Appeals nor intervening underwriters have distinguished between the tariffs referred to above. Each Court held that by tariff and bill of lading provisions petitioner waived the saving provisions of the Harter

Act and all other defenses, and assumed full liability to cargo owners for cargo loss and damage.

Petitioner having, as stated in the first *Wyman, Partridge* case (XIII, I. C. C. 258, at 262), an "insurable interest in the goods", took out marine insurance "*for its own benefit.*" It procured at a cost of approximately $25,000 from the Atlantic Mutual Insurance Company and other interventing underwriters, insurance upon its carrier's liability aggregating $1,100,000.

Excess insurance was also permitted by the policies. (R. 66.) The policy provisions are set forth in a rider designated as "First Interest" (R. 63-68), the last clause of which provides as follows:

> "The terms and conditions of this form are to be regarded as substituted for those of the Policy to which it is attached, the latter being hereby waived." (R. 67.)

By this form of special rider, intervening underwriters agreed to and did:

> "Insure, lost or not lost, Great Lakes Transit Corporation for account of whom it may concern. Loss, if any, payable to Great Lakes Transit Corporation or order. At and from April 15, 1933 to midnight (Chicago time) December 12, 1933 • • • on cargo of any kind owned by the Assured and on the *Assured's liability to others in respect of cargo of any kind covering* same from time said Great Lakes Transit Corporation becomes responsible therefor and until its responsibility ceases • • • and under and/or on deck on board of the Assured's steamer • • • 'George D. Dixon' • • • the Assured *taking upon themselves* as to said cargo, or parts thereof, all the risks, perils and liabilities which by law a common carrier by land or water assumes, and also the insurance of said cargo

against perils of the seas and lakes, fire, jettisons, barratry, negligence of master or mariners, loss or damage arising through explosions howsoever or wheresoever occurring, bursting of boilers, breakage of shafts or through any latent defects in the machinery or hull, and all other acts, perils or misfortunes that have or shall come to the hurt, detriment, damage to or loss of the said cargo and undertake to *indemnify and hold harmless the said Assured* against hurt, detriment, damage to or loss of such cargo from any and all such risks, perils, acts or misfortunes, to the extent which the *Assured* may be held by the owners thereof, *under any liability the Assured shall have assumed as common carriers, insurers, or otherwise, and for any and all claims which said cargo may be called upon to contribute in General Average.* • • • *There shall, however, be deducted from the aggregate of all claims on each eastbound or westbound passage, the sum of $1,000.00.*" (Italics ours). (R. 63-6.)

It will be noted that the only direct cargo coverage is on cargo "of any kind owned by the assured" (Great Lakes Transit Corporation). Petitioner could not be liable to itself and this direct coverage was necessary if it was carrying in its own vessels any cargo which it owned. The remaining portions of the covering clause have solely to do with insurer's "*liability to others in respect to cargo of any kind*" (R. 63).

The policy recognizes that it is not the ordinary water carrier's liability with statutory and contract exemptions, but that the assured has waived all its defenses and is "taking upon themselves as to said cargo or parts thereof all the risks, perils and liability which by law a common carrier, by land or water, assumes, and also the *insurance* of said cargo against the perils of the seas, lakes" etc. • • • and "the said assurers agree and undertake to indemnify and hold

harmless the said assured (Transit Corporation) against • • • damage to or loss of such cargo from any and all such risks • • • to the extent which the Assured may be held by the owners thereof under any liability the assured (Transit Corporation) shall have assumed as common carriers, *insurers* or otherwise" (R. 64, 65).

After the collision a large number of claims for cargo loss and damage were presented by cargo owners to petitioner *as carrier* (R. 52). Petitioner paid such claims on various dates subsequent to the collision and prior to January 22, 1934, in the total amount of $21,987.57 (R. 53). All of such claims were treated in the same manner, without differentiation by reason of any varianee in the wording of the tariff provisions under which the respective consignments were carried. All of such payments were made by drafts on appellant to the cargo owners, or order, stating the amount was "in full settlement of your claim" (R. 53, 87).

The total amount of allowable cargo claims had not been ascertained at the time the stipulation was signed on account of the fact that in due course many of such claims were presented in the first instance to originating carriers before being forwarded to petitioner, and considerable delay resulted before all claims were finally received, examined and approved.

However, on January 22, 1934, average adjusters prepared a partial statement of loss on cargo, including the amount of claims paid by appellant up to that time, plus the expenses of the adjusters and less the sum of $1000.00 deductible average provided in said policy (R. 53, 94-96). They then presented claim to in-

tervening underwriters for the net amount so determined, *the amount of the deductible average being borne by petitioner* (R. 53). The several underwriters reimbursed petitioner for such net amounts by checks issued on January 27, 1934, and subsequent dates (R. 53). It was stipulated that when further claims are received, approved and paid by petitioner a further statement or statements will be made and payment will be made in like manner to petitioner by underwriters including cargo's proportion of General Average and like expenses (R. 54). This was done.

These payments by petitioner and reimbursement by underwriters were made in due and ordinary course, as is shown by paragraph "7" of the stipulation (R. 54-5). In that paragraph it was stipulated that policies in substantially the same form as those here involved, issued by Atlantic Mutual and other underwriters to petitioner, were in effect for each year from 1928 to 1933 inclusive, and during all of these years general cargoes were carried and transported by petitioner pursuant to bill of lading and tariff provisions having the same legal force and effect as those here involved. During this period numerous cases of loss of and damage to such cargoes had arisen as the result of perils of the sea and in each case the procedure adopted and carried out with respect thereto, was the same as the procedure set forth above with respect to the *Dixon's* cargo, to wit, petitioner paid the losses and was reimbursed for such payments by underwriters.

Effect of the decree that intervening underwriters are entitled to recover back from petitioners a moiety of the amount they had theretofore paid with respect to cargo loss or damage.

If, as held by the Courts below, intervening underwriters, through subrogation to the rights of cargo owners can recover back from petitioner the moiety of cargo loss and damage for which it was held liable on account of the Dixon being guilty of fault which contributed to the collision, then they can recover back—or need not have paid—for cargo loss, however caused. Petitioner assumed liability by its tariffs for "marine perils, to wit, of the seas and lakes, fire, *collision*, stranding, etc." Collision is not and cannot be differentiated from the other perils enumerated. It follows therefore that the policies for which petitioner paid a premium of approximately $25,000 were worthless, other than as insurance on cargo *owned* by the petitioner. If it be suggested that the insurance protected cargo owners against petitioner's insolvency, the reply is that the initial carrier, liable under the Carmack Amendment, and the rail carrier delivering to petitioner would also have to be insolvent, since cargo owners could recover from either of these carriers and after payment made, subrogated underwriters would have the same right. Surely insolvency is a contingency too remote to even consider as a reason for insurance of this character.

If the decree directing a *recovery back* be correct, underwriters can likewise recover back the moneys they have paid petitioner to reimburse it for its payments to cargo owners for other cargo loss and damage during the five years (1928 to 1933 inclusive) in which they

have issued to petitioner policies in substantially the same form as those now under consideration (R. 54). Why the useless formality of paying at all?

Argument.

Petitioner submits:

1. The insurance policies were contracts between intervening underwriters and petitioner under which petitioner was entitled to be indemnified for the liability which it had assumed under bill of lading and tariff provisions, with the result that

(a) Intervening underwriters having insured petitioner's liability were subrogated to the rights of petitioner and not to the rights of cargo owners, and as thus subrogated they are entitled to recover payments of the cargo damage to the extent they have reimbursed petitioner therefor and no more; and

(b) Even though the policy be construed as a coverage on cargo alone, petitioner, the named assured, having an insurable interest therein, was entitled to the benefit thereof; and intervening underwriters, *as against petitioner,* were not subrogated to the rights of cargo owners, for the reason that the loss was payable and has been paid to the named assured.

2. Intervening underwriters have no right to indirectly recover a moiety of their payments from or at the expense of petitioner, their assured, by entry of a form of decree providing for full recovery of their payments from the "King."

3. Neither under the allegation of fact contained in the intervening petition, nor under the prayer for relief, nor under the stipulated facts, are underwriters entitled to recovery back of a moiety of the moneys they have voluntarily paid petitioner.

4. Any form of interlocutory decree providing for a division of damages on the basis of mutual fault should permit petitioner to recover its uninsured loss in respect of cargo of the "Dixon" and protect its right of indemnity under its policies of insurance.

POINT I.

The insurance policies were contracts between intervening underwriters and petitioner under which petitioner was entitled to be indemnified for the liability which it had assumed under bill of lading and tariff provisions.

The only parties interested in the question under review are petitioner and intervening underwriters. Cargo owners are not interested since they have been paid in full by petitioner. The Interstate Steamship Company is not interested since it required petitioner as owner to answer petitioner's claim as carrier and/or bailee of cargo and by its answer to the petition of intervening underwriters it has protected itself by asking that the cargo damages and costs "be equally divided between the owners of said steamers" (R. 104) with the result that under the holding of mutual fault it can only be called upon to pay a moiety of the cargo damage in any event.

Since intervening underwriters were not parties to the tariffs nor to the bills of lading under which cargo was being transported, these documents are not binding upon them, but they are of aid to determining the reasons for and the nature of the insurance coverage and the intent of the parties in entering into the insurance contract.

It is immaterial as to whether the policy did or did not include a direct insurance on cargo (other than cargo owned by petitioner) since if it was both a cargo policy and a carriers liability policy, petitioner would be entitled to the carriers liability coverage. Even if the insurance was upon cargo and cargo alone, under the doctrine of *Wager vs. Providence Ins. Co.*, 150 U. S. 99, which will be considered later, intervening underwriters were not entitled to recover back the moneys they paid their named assured.

The first question presented is as to whether the policy did insure petitioner's liability to cargo owners which it had assumed by waiving under its tariffs, the saving provisions of the Harter Act, and all other defenses to which it would otherwise have been entitled by law and under the bills of lading which it had issued. There is no question but that it was competent for petitioner to waive the saving provisions of the Harter Act and assume a common law or other liability.

Charles J. Webb & Sons vs. Central RR. Co. of N. J., 36 F. (2d), 702, 704;
Southern Cotton & Oil Co. vs. Merchants & Miners Transp. Co., 179 Fed. 133, 134;
The Gerald A. Fagan, 49 F. (2d) 215;

Marine Transit Corp. vs. Northwestern Fire & Marine Ins. Co., 67 F. (2d) 544;
The Nat Sutton, 62 F. (2d) 787.

Four items seem to have moved both the Courts below to their conclusion, in substance and effect, that the insurance was solely for the benefit of cargo: first, the headings of the tariffs; second, the fact that cargo owners through an increased freight rate paid for the insurance procured; third, the provision in the policy that it was for account of whom it may concern; and fourth, that suit was brought by petitioner "as carrier and/or bailee of cargo" as well as "owner" of the Steamer "Dixon".

The headings "Marine Insurance", "Rates named in these tariffs include Marine Insurance", "Governing Marine Insurance on Rail and Lake Traffic" (R. 78-86) were proper—for, says Commissioner Prouty, *Wyman, Partridge* case (XIII, I. C. C. 258 at 263) who directed the inclusion by lake carriers of the marine insurance clause in the verbiage now appearing in petitioner's tariffs—"In such event (inclusion of the clause) the carrier itself would become the *insurer* and the shipper would require no other insurance." In the light of the *Wyman, Partridge* case further citation of authorities would not seem necessary. It has frequently been held that an agreement to procure insurance or marine insurance imposes upon the carrier the liability of an insurer, or equivalent to that of an insurer.

In *Hill vs. Scott*, (1895) 2 Q. B. 371 (affirmed by the Court of Appeals on the opinion below L. R. (1895),

2 Q. B. 713), a carrier charged a through rate covering all expenses, "including insurance", and in a suit by the shipper to recover for a cargo loss claimed that he was not liable for any loss covered by insurance and that the shipper should look to the insurance company. It was held that the carrier was liable notwithstanding a prior course of dealing under which the carrier had settled with the shipper *after* receiving payment from underwriters, and it was stated (378):

> "I come to the conclusion that the insurance was effected by the defendant for his own protection, and not as agent on behalf of the plaintiff • • •.
>
> "Lastly, I see nothing remarkable in the shipowner insuring himself. In a case where there was a bill of lading with widely sweeping exceptions, no doubt it would be necessary; but, where, as here, there is no bill of lading (exception) the shipowner frequently effects an insurance to protect himself against liability."

In *Southern Cotton Oil Co. vs. Merchants & Miners Transp. Co.*, 179 Fed. 133, the bill of lading provided:

> "The freight mentioned in this bill of lading is covered by marine insurance • • • under and in accordance with and subject to the conditions and limitations of policies of marine insurance held by (the carrier)."

After holding that the policies taken out by the carrier did not permit the interpretation of being direct insurance on the goods, but only reinsurance of the carrier's own risk, Judge Learned Hand held the obligation of the carrier under the bill of lading provisions was

> "to pay the shipper's loss under the same contingencies as permitted him through his own *reinsurance* to throw the loss upon his own insurers. This I do not think was *ultra vires* a carrying corporation and did not constitute doing an independent insurance business." (Italics ours.)

In *Gross vs. New York & Texas SS. Co.*, 107 Fed. 516, the carrier agreed for a higher rate of freight to "cover the shipments with marine insurance from Galveston northward." Both the shipper and carrier had taken out policies of insurance and the underlying question was as to which set of underwriters should ultimately bear the loss, but the suit was brought by the shipper against the carrier and recovery could not be made from it unless it were directly and primarily liable. It was concluded (p. 525) that the effect of the clause was to make the goods at the risk of the carrier, and the shipper was permitted to recover.

The *Wyman, Partridge* (*supra*) case granted an increased freight rate to the lake carriers to compensate them for the inevitable losses they would sustain when they assumed full liability to cargo, or to permit them to reinsure such liability. That the shipper paid the insurance premium in the freight rate is therefore no reason for holding that the policies were or were required to be cargo policies; or were solely for the benefit of cargo.

Most marine policies written on or with respect to cargo, after naming the assured, contain the words "for account of whom it may concern" and state that the loss is payable to the named assured "or order". If the named assured has an insurable interest *he is concerned and is insured to the extent of his interest.* Commissioner Prouty in the *Wyman, Partridge* case *supra* says that if the carrier assumed full liability it would acquire "an *insurable interest* in the goods and could take out insurance for its own benefit." (XIII I. C. C. 258 at 262).

In *Phoenix Ins. Co. vs. Erie Transp. Co.*, 117 U. S. 312, a cargo policy had been procured which insured one Charles E. Chase "on account of whom it may concern" (315). Under the contract of carriage the carrier was given the benefit of the shipper's insurance. This Court stated:

> "Any one who has made himself responsible for the safety of goods has a sufficient interest in them to enable him to obtain insurance upon them" • • • (323).
>
> "So a common carrier, a warehouseman, or a wharfinger, whether liable by law or custom to the same extent as an insurer, or only for his own negligence, may, in order to protect himself against his own responsibility, as well as to secure his lien, cause the goods in his custody to be insured to their full value, and the policy need not specify the nature of his interest" (323, 324).

This Court said in *Hooper v. Robinson*, 98 U. S. 528, at 538:

> "A right of property in a thing is not always indispensable to an insurable interest. Injury from its loss or benefit from its preservation to accrue to the assured may be sufficient, and a contingent interest thus arising may be made the subject of a policy. *Lucena v. Crawford, et al.*, 3 Bos. & Pul. 75; s. c. 5 *id.* 269; *Buck & Hedrick v. Chesapeake Ins. Co.*, 1 Pet. 151; *Hancock v. Fishing Ins. Co.*, 3 Sumn. 132.
>
> "In the law of marine insurance, insurable interests are multiform and very numerous.
>
> "The agent, factor, bailee, *carrier*, trustee, consignee, mortgagee, and every other lien-holder, may insure to the extent of his own interest in that to which such interest relates; and by the clause, 'on account of whom it may concern,' for all others to the extent of their respective interests, where there is previous authority or subsequent ratification." (Italics ours.)

None of the cases are *contra*.

Since all cargo claims had not been passed, approved and paid, when suit was started, unpaid cargo owners had an action directly against the Steamer "*Willis L. King*" and the Interstate Steamship Company. For this reason the Transit Corporation brought suit as owner of the Steamer and as carrier and/or bailee of cargo, seeking in its own right to recover the amount which it had then paid for cargo damages and as carrier and bailee the amount not at that time paid. This appears from the libel which contains the allegation that the Transit Corporation in "respect of the aforesaid damage to the Steamer "*Dixon*", loss of earnings and use and expenses and *cargo loss and damage*, and as carrier and/or bailee of the said cargo, has sustained damage • • • amounting to $120,000.00" (R. 15). In the stipulation of facts in which the so-called insurance question is presented, it is provided that when further claims in excess of the $22,338.57 referred to above, are received, approved and paid by the Great Lakes Transit Corporation, a further statement or statements will be made and payment will be made in like manner by the underwriters, that is, payment will be made by underwriters to the Transit Corporation (R. 54-5), for the latter's own account. This has been done.

It thus appears that the fact that the petitioner brought suit as carrier and/or bailee of cargo as well as owner of the "Dixon" in no wise supports the conclusion that the policy was direct insurance on the cargo for the sole benefit of cargo owners, and that petitioner was merely an agency to effect such insurance and collect losses.

Consideration will now be given to the opinions of the lower courts which differ radically. Judge West

holding that the policies covered petitioner's carrier's liability and did not cover cargo, and Judge Hicks holding that the policies covered cargo but did not cover petitioner's carrier's liability.

Opinion of the District Court.

Judge West, in his first opinion (R. 105) directed that the decree should be for a moiety of cargo damage against each vessel, and that underwriters "are entitled to enforce the liability of the *'King'* and that of the *'Dixon'*, each for a moiety of the cargo loss." He directed, however, that the decree presented by the proctors for the "Dixon" should be entered. This he later retracted by a letter (R. 105) and in a supplemental opinion (R. 107-8) he concluded, as petitioner reads the opinion, as follows:

> 1. That the tariffs providing "rate • • • include marine insurance" obligated the Transit Corporation to procure cargo policies, and this was not done.
>
> 2. That the policies actually issued cover the legal liability of the Transit Corporation in which coverage cargo owners have no insurable interest.
>
> 3. That coverage of the carriers legal liability is sufficiently broad to include the Transit Corporation's liability for failure to provide cargo insurance, and that as to this coverage cargo owners have an insurable interest, to which intervening underwriters are subrogated.
>
> 4. That cargo owners were entitled to have the protection of cargo insurance as well as that of carriers common law liability, and the carrier having failed to procure cargo insurance could not by paying the loss out of its own funds, take away from underwriters the right of subrogation which they would have had had there been cargo insurance.

Since the Interstate Commerce Commission directed lake water carriers to discontinue procurement of blanket cargo insurance and instead to include in their tariffs "marine insurance clauses" substantially in the form of tariff provisions involved in the case at bar, and also directed the uniform bill of lading be supplemented by adding Section 9 (e), which obligated such carriers to assume liability for perils of the seas where commodities were moving under so-called "insured bills of lading", it is difficult to find any basis in the District Judge's conclusion set forth in item "1" above.

It is likewise difficult to find any basis for the Court's conclusion set forth in Item "3" above. If intervening underwriters did not insure cargo owners, as the Court held they did not, there was no relation, contractual or otherwise, between cargo owners and underwriters. They were in effect strangers to each other, neither of whom could be subrogated to the rights of the other. If petitioner had *agreed with intervening underwriters* to procure cargo insurance which would relieve them of their obligation to pay under the liability policies which they had issued, and if petitioner had failed in that regard, there would be a breach of contract which would justify underwriters in refusing to pay under their policy. No such claim is made or even suggested. Indeed no such contention would be possible since the policy, in effect insuring nothing, would be worthless. Mr. Winter vice president of the Atlantic Mutual Insurance Company intervening underwriter, having the largest interest in his book "Marine Insurance, its Principles and Practices" at page 368. states that it will be found that the ordinary cargo policy usually

contains a provision that cargo underwriters are not liable where goods are in possession of a carrier "who may be liable for such loss or damage by law or under an insured bill of lading, or under a rate of freight that includes insurance." It will be found that the cargo policy to which the rider "First Interest" is attached does contain such clause.

> "Warranted by the assured free from liability for any loss of or damage to goods in the possession of any carrier by land and/or water or in the possession of any other bailee who may be liable for such loss or damage by law, or *under an insured bill of lading, or under a rate of freight that includes insurance;* and free from any liability for goods shipped under a bill of lading containing a stipulation that the carrier may have the benefit of any insurance on such goods." (Italics ours) (R. 61).

Assuming, however, that additional policies had been procured which did not contain the "warranted free" clause referred to above, and that such policies were made payable either directly to cargo owner or to the Transit Corporation as an agent with the limited power of collecting and paying over the insurance, nevertheless, the ultimate liability would be with the intervening underwriter. The procedure would be as follows: first, cargo underwriters would pay cargo owners and would be subrogated to their rights; second, cargo underwriters thus subrogated would bring suit against petitioner which would have no defense and must pay since it had waived the saving provisions of the Harter Act, and assumed full liability; third, petitioner would bring suit against intervening underwriters who likewise would have no defense since under policy provisions they had agreed to indemnify the Transit Corporation to the extent to which it might be liable under

any liability "it shall have assumed, as common carriers, insurers, or otherwise" (R. 65).

Opinion of the Circuit Court of Appeals.

It must at all times be remembered that the word "Assured" in the policy always means the Great Lakes Transit Corporation, not the cargo owner. This appears if an attempt is made to substitute the name of the cargo owner wherever the word "Assured" appears. For example, if "cargo owners" is substituted for petitioner in the indemnity clause, it is meaningless since it would read as follows:

> "The said Assurers (Atlantic Mutual Insurance Co. *et al.*) agree • • • to indemnify • • • said Assured (cargo owners) to the extent • • • which the Assured (cargo owners) may be held • • • under any liability the Assured (cargo owners) shall have assumed as common carrier, insurers or otherwise" (R. 65).

The Circuit Court of Appeals states:

> "As to the second question i. e., whether the *cargo insurance* was payable to the owners of the Dixon as carrier, or as bailee or trustee of the cargo for the owners:
>
> "The gist of the Transit Corporation's answer to the intervening petition was, that the policies of insurance were intended to, and did, insure and indemnify it against liability assumed by it to cargo owners for loss or damage, and that *though the insurers had the cargo owner's right by subrogation against the King* for a moiety there was no such subrogation against the Transit Corporation, since it was this very type of loss against which the insurers had agreed to indemnify it." (Italics ours) (R. 130).

The Transit Corporation by its answer to the intervening petition of underwriters (R. 98, 100) and in

brief and argument at all times contended that the insurance covered its liability and that intervening underwriters *were not subrogated to the rights of cargo owners* but were subrogated to the rights of the Transit Corporation to the extent of the payments made to it.

The Circuit Court of Appeals further states:

> "We think the policies in suit were procured by appellant in compliance with its contracts and were issued *primarily* for the benefit of cargo owners." (R. 132). (Italics ours).

Since the policies were procured in order to place petitioner in funds with which to pay cargo owners, in one sense it might be said that the contracts were issued for the benefit of cargo owners. This would especially be true in New York. There, under the insurance law, Section 109, where there is liability insurance covering damage to property caused by any vehicle, in case of insolvency of the owner of the vehicle can be brought directly against the underwriter. A vessel has been classed as a vehicle under this section.

> *Hinkle vs. Globe & Rutgers Fire Ins. Co.*, 1935 A. M. C. 1330, not otherwise reported, but affirmed 246 N. Y. 737 and 271 N. Y. 585.

The subject of the insurance is contained in the opening clause of the fourth paragraph "on cargo of any kind owned by the assured and *on the assured's liability to others in respect to cargo* of any kind covering same from time said Great Lakes Transit Corporation becomes responsible therefor and until its responsibility ceases" etc (R. 63). Petitioner could not be liable to

itself, and direct coverage of its own cargo (of which there was none on board the "Dixon") moving on its own vessels, was essential. Otherwise the policy speaks solely in respect to petitioner's liability to others.

Consideration will be given to the specific portions of the opinion which the Circuit Court of Appeals states sustain the conclusion that the policy is a cargo coverage. The opinion states:

> "The specific coverage is upon any cargo per vessel sailing from initial port prior to December 12, 1933 midnight (Chicago time) until Great Lakes Transit Corporation's *responsibility* therefor ceases" (R. 132) (Italics ours).

If the policy is a direct coverage on cargo, why should the duration of the coverage be measured by the *responsibility* of petitioner therefor? If the coverage was against carriers liability to others in respect to cargo, the duration of its responsibility therefor was the proper time provision.

The opinion states:

> "Again, the policy provides, 'and also the insurance of said *cargo against perils of the seas and lakes;*' and further, 'and for any and all claims which said *cargo may be called upon to contribute in general average.*'" (Italics ours) (R. 132).

Correctly quoted the excerpt reads:

> "It is agreed • • • that the Assured (Great Lakes Transit Corporation) (are) *taking upon themselves* as to said cargo • • • the *insurance* of said cargo against perils of the seas and lakes • • • and the said Assurers agree and undertake to indemnify and hold harmless the said *Assured* against hurt, detriment, damage to or loss of such cargo from any and all such risks, perils, acts, or misfortunes, to the extent which the Assured may be held liable by the owners thereof under any liability the Assured shall have assumed as common carriers, insurers or otherwise, and for any and all claims which the said cargo may be called upon to contribute in General Average" (R. 64-5).

The Learned Judge, writing in the court below, quotes the following excerpt justifying his conclusion that the coverage was on cargo:

> "Liability under this policy for any loss or losses, claim or claims, arising in respect to each cargo while on board of each of the above named steamers and/or substituted steamers • • • including connecting water conveyances or in respect to cargo while on docks, wharves or elsewhere on shore as the result of any one occurrence is hereby limited • • •" (R. 132).

It will be noted that it is the "*liability*" for "loss or losses • • • arising *in respect to each cargo*", that is limited—not the loss of or damage to cargo.

Again the Court says:

> "There is a provision covering damages to shipments in refrigerators and the usual standard 'sue and labor' clause. It would also seem, as indicated by the District Judge, that the phrase 'on the assured's liability to others in respect to cargo' would protect cargo owners against a breach of appellant's obligation to furnish marine insurance for which the owners had agreed to pay a higher rate" (R. 133).

The use of the expression "*shipments* in refrigerators" (R. 65)—not "commodities" in refrigerators—clearly shows that it was the liability of petitioner for the sound delivery of such shipments, that was insured. Surely there was every reason why underwriters should desire petitioner to sue and labor "for and about the defense, safeguard and recovery of the said cargo, or any part thereof" (R. 66) when its liability to cargo owners and the liability of underwriters to it was measured by the amount of such loss or damage.

It is difficult to understand how the very subject of the insurance, "liability to others in respect to cargo",

(R. 63) could be narrowed to mean a liability for failure to procure direct insurance upon cargo, and nothing more, especially when the Interstate Commerce Commission has held that blanket coverage on cargo would not satisfy tariff provisions.

The Court further states:

> "Appellant relies upon the following clause found in each of the policies:
>
> 'The Assured' (the Transit Corporation) taking upon themselves as to said cargo or parts thereof, * * * the insurance of said cargo against perils of the seas and lakes * * * and the said Assurers agree and undertake to indemnify * * * said Assured * * * to the extent to which the Assured may be held liable by the owners thereof under any liability the Assured shall have assumed as common carriers, insurers or otherwise * * *"
>
> "But this clause does not avail appellant because it did not take upon itself the insurance of cargo or assume any liability with reference thereto as an insurer. Its obligation as to insurance went no further than to require it to procure policies of insurance from others" (R. 133).

In order that the coverage should be full and complete, after the words "common carrier" we find the words "insurers, or otherwise", the underwriters thereby stating to petitioner that no matter what liability is assumed, in so far as cargo loss is concerned, we, the underwriters, will reimburse you.

The *Wyman, Partridge* case (XIII, I. C. C. 258) held that by the marine insurance clauses which it directed (XV, I. C. C. 577 at 581) and were in substance contained in eight of the ten tariffs under which

cargo on the "Dixon" was moving, "the carrier itself would become the insurer and the shipper would require no additional insurance." (XIII, I. C. C. 258, at 262.) This would seem to negative the holding that petitioner did not take upon itself the insurance of cargo or assume any liability with reference thereto as an insurer. Be that as it may, the policy is a contract between the Transit Corporation and the underwriters. It states that it is *agreed* that the assured (Transit Corporation) are "taking upon themselves as to said cargo the *insurance* of said cargo against the perils of the seas and lakes" and the assurer agreed to indemnify the said assured (Transit Corporation)—"as insurers". (R. 65.) When the parties to a contract both characterize a liability as that of an insurer and one agrees to indemnify the other against such liability, surely the contract is not wholly ineffective because the liability which the parties have in contemplation and have so characterized in their agreement is technically only "equivalent to that of an insurer" (Opinion C. C. at R. 131), and not "as an insurer".

It is therefore submitted that except as to "cargo owned by the assured" the policy was purely and simply a coverage on carriers liability. Even if the petitioner be in error in this regard and the policy was "*primarily*" for the benefit of cargo as held by the Circuit Court of Appeals, (R. 132), surely it *included a carrier's liability coverage.* That intervening underwriters did make payment under the last mentioned coverage is shown by the fact that they paid petitioner by drafts to its order and not by drafts to petitioner as trustee or as carrier and/or bailee for cargo owners. Had petitioner been acting as trustee or bailee for cargo owners it would have waited until it made

collection from underwriters before paying cargo owners. Instead it made payment immediately claim was made and audited. Underwriters awaited proofs of such payment before reimbursing petitioner, thus evidencing that these payments were in satisfaction of its liability to petitioner and not to cargo owners.

Carriers liability policies are very common. Indeed the Interstate Commerce Commission in 1907 anticipated that such insurance would be procured by common carriers when it directed the use of the marine insurance clause now contained in petitioner's tariffs *Wyman, Partridge & Co. vs. Boston & Main RR.*, (XIII, I. C. C. 258 at 262). Mr. Winter of the Atlantic Mutual Insurance Company, in his book on marine insurance referred to above has this to say with respect thereto:

> "There are also liability forms issued to common carriers under which *the insurable interest is not cargo, but the liability, either imposed by law or assumed by contract, of the carriers for cargo in their custody*" (p. 113).
>
> "Transit Floaters • • • Policies by which the interest insured is the liability of a common carrier for loss suffered to property in his custody are sometimes issued. *The subject of insurance is not the property itself, but the liability of the carrier, whether this be implied* by law or assumed by contract. Such a policy is unvalued, the responsibility of the underwriter being limited only by the amount expressed in the policy and not by the value of the property to which the liability relates" (pp. 129, 130). (Italics ours.)

A.

Intervening underwriters having insured petitioner's liability were subrogated to the rights of petitioner and not to the rights of cargo owners, and as thus subrogated they are entitled to recover payments of the cargo damage which it has been decreed the "King" must pay, to the extent they have reimbursed petitioner therefor, and no more.

It is elementary that an underwriter can only be subrograted to the rights of his assured after payment and in the amount thereof.

Liverpool & Great Western SS. Co. v. Phoenix Ins. Co., 129 U. S. 397 at 462.

Chicago etc. RR. Co. v. Pullman Car Co., 139 U. S. 79 at 87.

St. Louis etc. RR. Co. v. Commercial Ins. Co., 139 U. S. 223 at 235.

Wager v. Providence Ins. Co., 150 U. S. 99 at 108.

Hartford Fire Ins. Co. v. Chicago, Milwaukee & St. Paul Ry. Co., 175 U. S. 91 at 96.

Luckenbach v. W. M. McCahan Sugar Rfg. Co., 248 U. S. 139 at 146.

Having reimbursed petitioner for the amount of cargo loss and damage (less deductible average), intervening underwriters are entitled to be subrogated to petitioner's rights, to wit: the right to receive the portion of the loss and damage which it has been decreed that the "King" must pay (less one-half of the deductible average), and no more.

B.

Even though the policy be construed as a coverage on cargo alone, petitioner, the named assured, having an insurable interest therein, was entitled to the benefit thereof, and intervening underwriters as against petitioner were not subrogated to the rights of cargo owners for the reason that the loss was payable and has been paid to the named assured.

That petitioner had an insurable interest in the cargo of the "Dixon" cannot be questioned.

Hooper vs. Robinson, 98 U. S. 528 at 538.
Phoenix Ins. Co. vs. Erie & Western Transp. Co., 117 U. S. 312 at 323-4.

Even if the policy can be construed as one solely upon cargo, the case would then come squarely within the doctrine of *Wager v. Providence Ins. Co.*, 150 U. S. 99. There, open policies had been issued to Morse & Co. "for account of whom it may concern." Morse & Co. had assumed the obligations of a carrier. Certificates of insurance under these open policies were issued to Morse & Co. and endorsed to the order of the cargo owner, and after a loss had occurred for which the carrier was liable, the insurance company paid the amount of the policy to the cargo owner. The insurance company then brought suit against Morse & Co. and against Wager, master of the vessel, to recover the amount so paid.

This court pointed out that if as theretofore held by it a carrier by agreement could have the benefit of a shipper's insurance, he surely was entitled to a like benefit if the insurance was made payable to the carrier or his order. We quote (108-9):

"But it is equally well settled that the right, by way of subrogation, of an insurer, upon paying for a total loss of the goods insured, to recover over against the carrier, is only that right which the assured has, and that accordingly when a bill of lading provides that the carrier, when liable for the loss, shall have the full benefit of any insurance that may have been effected upon the goods, this provision is valid, as between the carrier and the shipper; and that, therefore, such provision limits the right of subrogation of the insurer, upon paying the shipper the loss, to recover over against the carrier. *Phoenix Ins. Co. v. Erie & Western Transp. Co.*, 117 U. S. 312; *St. Louis, Iron Mountain etc. Ry. v. Commercial Union Ins. Co.*, 139 U. S. 223.

"If a valid claim by the underwriter to be subrogated to the rights of the owner will not arise where the carrier has contracted with the owner that he, the carrier, shall have the benefit of any insurance, it would seem to be clear that where the carrier is actually and in terms the party insured, *the underwriter can have no right to recover over against the carrier*, even if the amount of the policy has been paid by the insurance company to the owner on the order of the carrier." (Italics ours.)

This Court further held:

"H. Morse & Co. were, nominally at least, the parties insured and came within the terms of the policy, and upon a loss, were entitled to receive the amount of the policy, and *of course, in that event, the insurers could not, after having paid H. Morse & Co. the amount of the loss, recover it back from them under the principle of equitable subrogation.*" (Italics ours:)

The Court then found that no different conclusion should be reached because of the fact that the insurance companies paid the amount of the loss directly to the cargo owners. In the *Wager* case the bills of lading did *not* contain any provision giving the carrier the benefit of the shipper's insurance (the first head-

note to that case being misleading) and in every respect the decision is in point on the issues here involved.

To the same effect as the *Wager* case are:

The John Russell, 68 F. (2d) 901;
Sorenson vs. Boston Ins. Co., 20 F. (2d) 640;
Gross vs. New York & Texas SS. Co., 107 Fed. 516; 521.

See also discussion in:

Phoenix Ins. Co. vs. Erie & Western Transp. Co., 117 U. S. 312 at pp. 320-325.

In the case of *Lowery vs. Connecticut Fire Ins. Co.*, 70 F. (2d) 324, cited by Judge West in his supplemental opinion, (R. 107) the question was as to whether a vessel owner not named in a liability policy was entitled to the benefit of insurance issued in the name of the charterer, who was the carrier of the cargo. The obligation of the underwriters to indemnify the *carrier*, named as the assured in their policies, was admitted.

The District Judge cites the *Wager* case (R. 108). He held in effect that had there been cargo insurance the *Wager* case would have been applicable, but since the basis of petitioner's liability and underwriters' subrogation was petitioner's failure to procure such insurance, the *Wager* case was inapplicable. The fallacy of this conclusion is pointed out above. Although it was urged before the Circuit Court of Appeals, both in the original brief and argument and in petition for reargument, that the *Wager* case was controlling, no mention of it is made in the opinion nor has any attempt been made to distinguish it in briefs

or arguments of counsel for intervening underwriters. It is submitted that it is controlling.

POINT II.

Intervening underwriters have no right to indirectly recover a moiety of their payments from or at the expense of petitioner, their assured, by entry of a form of decree providing for full recovery of their payments from the King.

The right of subrogation is an incident of the doctrine that the assured shall be indemnified, but shall never be more than fully indemnified, for loss; and in applying the rule the broadest equities should be sought (*Joyce, The Law of Insurance*, 2d Ed., Secs. 29, 3537). Having no right of direct recovery against their own assured, intervening underwriters surely cannot indirectly effect such a recovery upon principles of subrogation. "In any form of remedy the insurer can take nothing by subrogation but the rights of the assured." *Phoenix Ins. Co. vs. Erie & Western Transp. Co.*, 117 U. S. 312, 321.

No technical rule of law requires that such a result be accomplished by entry of a decree, in the first instance, providing for the recovery by underwriters of the full amount of their payments from the "King," thus giving the "King" a right of recoupment or offset against petitioner. Where, as here, there is a direct liability of the carrying vessel to her cargo for loss due to mutual fault of the carrying vessel and a non-carrying vessel, the rule is the same as in the case of suit by the owner of a third ship or other innocent party damaged by the collision. The non-carrying vessel is pri-

marily liable for but a moiety of the damage, and only in case the innocent party is unable to enforce payment of the full moiety from one of the offending vessels may the deficiency be recovered from the other.

The Alabama and the Gamecock, 92 U. S. 695;
The Virginia Ehrman, 97 U. S. 309;
The City of Hartford, 97 U. S. 323;
The North Star, 106 U. S. 17;
The Sterling and the Equator, 106 U. S. 647;
The Beaconsfield, 158 U. S. 303;
The Hudson, 15 Fed. 162;
The Doris Eckhoff, 41 Fed. 156;
11 Corpus Juris, page 1173, Sec. 265; page 1216, Sec. 351.

The only situations in which an award may be made for the full amount of such loss as against one of the offending vessels are: (1) Where all the parties are not before the court (as in "*The Atlas*," 93 U. S. 302); or (2) where by reason of the Harter Act or other statutory provision, not waived by the carrying vessel, there is no liability on the part of the carrying vessel to her own cargo for the damages resulting from the collision (as in "*The Chattahoochee*," 173 U. S. 540); "*The North Star*," *supra*; "*The Toluma*," 72 F. (2d) 690; *New York & Cuba Mail SS. Co. v. American SS. Owners, etc., Co.*, 72 F. (2d) 694.

In the "*Grecian-City of Chattanooga*," 8 Fed. Supp. 380, there was a collision due to mutual fault, in which the "Grecian" and her cargo became a total loss. The value of the "City of Chattanooga" was sufficient to take care of all possible claims. The owner of the "Grecian" as owner and as bailee of her cargo, brought suit against the "City of Chattanooga" and her own-

er, to recover for the loss of ship and cargo. The cargo was being transported under a tariff filed with the Interstate Commerce Commission which was headed "Rates Include Insurance" and which provided that the cargo while water borne was insured against perils of the seas, etc. Exceptions to the libel were filed. The District Court held that the Harter Act was not waived and that libellant was entitled to a full recovery against the "City of Chattanooga" under the doctrine of *"The Chattahoochee," supra.* The Circuit Court of Appeals, 78 F. (2d) 657 reversed; stating:

> "Certain legal principles of general application to the right of recovery for cargo damage resulting from the collision of two vessels due to the fault of both are both well established and undisputed by these parties. • • • Moreover, when the provisions of the Harter Act (46 USCA Secs. 190-195) do not apply, the cargo owner, entitled to a recovery against both vessels at fault, may not recover a judgment in solido against both for his whole damage with the right to an execution against either as at common law for his whole damage but only a judgment against each for a moiety of the damages with the added secondary liability of each for the other's share. *"The Hudson"* (D. C.) 15 F. 162; *"The Sterling"* and *"The Equator,"* 106 U. S. 647, 1 S. Ct. 89, 27 L. Ed. 98. And this principle holds true where a shipowner sues as bailee of her cargo. *"The Doris Eckhoff"* (D. C.) 41 F. 156. *Thus it will be seen that the decisive question upon this appeal is whether the libelant by its contract of carriage waived the provisions of the Harter Act."* (660.) (Italics ours.)

The Court concludes:

> "Nevertheless, under its agreement in the bills of lading that the cargo of the "Grecian" was in-

> sured, the libelant was bound at least to place and, in case of loss, to collect and pay over the insurance to the cargo owners. That is to say, the libelant was bound either to deliver the cargo safely or, if it failed to do that, to deliver the insurance to the cargo owners instead. This was its liability to cargo for loss while the goods were water-borne. For present purposes it differs little from a direct assumption by the libelant, of an insurer's liability for sea perils." (662.)

The case was tried and upon a second appeal (85 F. (2) 102), the prior decision was affirmed. Petition for certiorari was denied by this Court (299 U. S. Advance Sheets 1, p. XXVI). It should be noted that the particular tariffs involved in the "Grecian-Chattanooga" litigation did not, as do eight of the ten tariffs in this case, contain a specific assumption of liability for marine perils. Nevertheless the appellate court held that this did not affect the result, as is shown by the excerpt quoted above. The decision was based upon the ground that upon occurrence of the cargo loss the carrying vessel, by reason of contract provisions, was liable for the amount of the loss; and, because of that liability, only a moiety of the cargo loss could be recovered from the non-carrying vessel. The "Grecian-Chattanooga" case had solely to do with the effect of the tariff provisions under which the cargo on the "Grecian" was moving. The construction of the insurance policy with respect to the cargo of the "Grecian" was not under consideration by the Court. The decision of the Circuit Court of Appeals that under the tariffs issued by the owner of the "Grecian" the saving provisions of the Harter Act were waived by the carrying vessel, fully disposes of the contention of intervening underwriters

that they are entitled to a full recovery against the "King."

Opposing counsel in the courts below relied upon the statement of this Court in *Erie R. R. Co. v. Erie & Western Transp. Co.*, 204 U. S. 220, that "the contract relations between the 'Conemaugh' and her cargo have nothing to do with the case." The suit then before the Court was a separate action for recoupment by the owner of the non-carrying vessel after it had been compelled to pay the entire damage to cargo of the carrying vessel. The history of the litigation is shown by the decisions of the Supreme Court in *"The New York,"* 175 U. S. 188; *Ex Parte Union Steamboat Co.*, 178 U. S. 317; *Union Steamboat Co. v. Erie & Western Transp. Co.*, 189 U. S. 363. In the prior litigation this form of decree was entered solely by reason of the failure of the owner of the "New York" to present the facts upon which its contentions were based, either by impleading the "Conemaugh" under the admiralty rule or by answer. The opinion of the Circuit Court of Appeals (108 Fed. 102), affirmed by this Court in Union Steamboat Co. v. Erie & Western Transp. Co. *(supra)*, clearly shows the exact situation. It is there said:

> "The cargo underwriters, having proceeded only against the 'New York,' were entitled to recover their full damages against it as the only vessel impleaded.
>
> "If the 'New York' had availed itself of admiralty rule 59, as was done in the case of *'The Beaconsfield,'* 158 U. S. 303, 307, 15 Sup. Ct. 860, 30 L. Ed. 993, and brought in the 'Conemaugh' as a vessel in fault, which also ought to be proceeded against for cargo losses, the question of the liability of that vessel to cargo underwriters would

> have been presented *and the cargo damages would have been divided, if it had been found that that vessel was also in fault for the collision, and had no valid special stipulations in her bills of lading relieving her from liability to cargo underwriters.* But this course was not taken. By neither cross bill, petition nor answer was this question of the 'Conemaugh's' liability to cargo underwriters presented. Nor does it appear that the question of recoupment, now raised by an assignment of errors upon the decree of the district court, was ever presented to that court by any form of pleading." (Italics ours.)

In the present case the owner of the "King" has impleaded the owner of the "Dixon" under the 56th Admiralty Rule to answer the latter's libel, in so far as the cargo claim is concerned, (R. 23) and in its answer to the intervening petition of underwriters has asked that its rights be preserved and that the decree against it be limited to a moiety of cargo loss and damage (R. 101, 104).

As between the two vessels, therefore, the "King" and the "Dixon" would each be primarily liable for a moiety of this cargo loss, in case of mutual fault. However, petitioner is here concerned not with rights of recovery by cargo owners (whose claims have been settled in full by petitioner), but with rights as between petitioner and its own underwriters, after payment of such cargo claims by petitioner and reimbursement by underwriters. Since underwriters cannot recover from their own assured, their only possible interest is to be subrogated, to the extent of their payments, to the right of petitioner to recover the moiety of such cargo losses for which the "King" remains liable.

POINT III.

Neither under the allegations of fact contained in the intervening petition, nor under the prayer for relief, nor under the stipulated facts are underwriters entitled to recover back of a moiety of the moneys they have voluntarily paid petitioner.

The intervening petition of Atlantic Mutual Insurance Company alleged that it had paid and would pay $6041.57 to petitioner for account cargo, and that it was subrogated to the rights of cargo owners in that amount (R. 45.) Underwriters' right to subrogation has been discussed above and the discussion will not be repeated here. The prayer for relief was "that the court would be pleased to decree to your petitioner *against the Interstate Steamship Company and against the steamer "Willis L. King"* the sum of $6041.57." (R. 46.) This was the full amount the Atlantic Mutual Insurance Company had then paid and would thereafter pay with respect to cargo damage. Both the District Court and the Circuit Court of Appeals correctly held that each of the colliding vessels was liable for a moiety of cargo loss and damage.

It was stipulated that underwriters voluntarily paid petitioner individually and not as carrier and/or bailee for cargo, the amount shown by the general average adjustment, and agreed to pay petitioner individually the balance of cargo loss and damage after the amount thereof had been ascertained and paid by petitioner to cargo owners (R. 52-4). The stipulation was filed after the intervening petition was entered into and filed and the issue as between intervening underwriters and petitioner framed (R. 49). Agreement as to future pay-

ments was an affirmation that prior payments were proper, and that the future payments were required. In effect, intervening underwriters said, it is essential to our case to prove that we are subrogated to the rights of cargo owners and that we are entitled to recovery in full from the "King." Failing upon either question, we are not entitled to recovery at all.

No fraud or mistake or lack of knowledge of the facts has been claimed, nor do we anticipate that such claim will be made in this court. In the absence of an allegation and proof of fraud or mistake, underwriters having full knowledge of all the facts cannot recover back the moneys they have voluntarily paid petitioner.

Lamborn vs. County Commissioners, 97 U. S. 181;
U. S. vs. Wilson, 168 U. S. 273;
48 Corpus Juris, 734;
U. S. v. William Edmonston, 181 U. S. 500.

The opinion of the Circuit Court of Appeals dismisses petitioner's urgency that there was no basis for a *recovery back*, in the following language:

> "This objection is without merit for appellant treated the intervening petitions as a sufficient basis for relief and stipulated the facts for the express purpose of permitting the court to pass upon the rights of the intervening underwriters 'in so far as concerns the form of interlocutory decree to be entered.'" (R. 134.)

Surely it is a far cry to hold that a stipulation of fact in which voluntary payment is admitted, no fraud or mistake is claimed, and which is entered into for the purpose of permitting the court to pass upon the rights

of intervening underwriters "in so far as concerns the form of interlocutory decree to be entered", permits a litigant to recover back such voluntary payment upon a theory never presented in pleading, proof or argument. The stipulation of fact was made to enable the court to render a decree upon the issues presented by the intervening petition and this petitioner's answer thereto.

It is submitted that the court's decision that the objection of petitioner discussed above "is without merit", is incorrect.

POINT IV.

Any form of interlocutory decree providing for a division of damages on the basis of mutual fault should permit petitioner to recover its uninsured loss in respect of cargo of the "Dixon" and protect its right of indemnity under its policies of insurance.

If such an interlocutory decree contained a provision permitting intervening underwriters to recover one moiety of their payments from the "King," their rights would be completely protected.

Cargo owners whose claims have been paid have no further right or interest in this proceeding and no appearance of counsel has been entered herein on their behalf. Undoubtedly all such claims will be paid prior to the entry of final decree but the rights of any cargo owners who have not been paid at the time of entry of interlocutory decree would be completely protected by a proviso in the interlocutory decree stating that it was

entered without prejudice to the rights of petitioner as carrier and as bailee of cargo, as such rights might exist at the time of entry of final decree.

The rights of petitioner have been completely ignored in the decree entered. Not only is it compelled to refund moneys paid to it by its own underwriters, but it was even denied any recovery of its uninsured loss in respect of cargo, that is, the $1000 deductible average for which it was not and will not be reimbursed by underwriters under the policies. As to this amount it is entitled in its own right to recover a moiety from the "King." It is also entitled to recover from intervening underwriters a proper proportion of the expenses incurred by it in maintaining the litigation against the "King."

In Conclusion.

The decree of the District Court should be reversed in so far as it decrees any recovery in favor of the Atlantic Mutual Insurance Company and other similarily situated underwriters, against the Great Lakes Transit Corporation or its Steamer "*George D. Dixon,*" and in so far as it directs that the said underwriters shall recover from the Interstate Steamship Company or the Steamer "*Willis L. King*" any sum in excess of a moiety of the amount for which said underwriters have reimbursed and will reimburse petitioner for payments it has made and will make to cargo owners for cargo loss and damage up to the time of the entry of the final decree herein; together with costs in favor of petitioner and against said underwriters in this court and the courts below; and with instructions that the interlocutory decree contain a proviso that it is entered

without prejudice to petitioner's rights as carrier and/or bailee of cargo with respect to claims of cargo owners whose claims have not been paid at the time of the entry of final decree.

Dated March 24, 1937.

Respectfully submitted,

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Counsel for Petitioner,
Great Lakes Transit Corporation.

In the Supreme Court of the United States

OCTOBER TERM, 1936.

No. 716.

GREAT LAKES TRANSIT CORPORATION,
Petitioner,

AGAINST

INTERSTATE STEAMSHIP COMPANY and
ATLANTIC MUTUAL INSURANCE COMPANY, *et al.*,
Intervening Underwriters,
Respondents.

BRIEF FOR
INTERSTATE STEAMSHIP COMPANY,
A RESPONDENT,
Opposing Petition for Writ of Certiorari as to One Branch of the Case—The Collision.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

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BRIEF FOR
INTERSTATE STEAMSHIP COMPANY,
A RESPONDENT,
Opposing Petition for Writ of Certiorari as to One Branch of the Case—The Collision.

The steamer George D. Dixon, owned by petitioner, was in collision with the steamer Willis L. King, owned by Interstate Steamship Company, a respondent. The collision happened in the St. Clair River. As found by the District Judge (R. 242):

> "The collision occurred about 5:40 p. m. on the Canadian side of St. Clair river at Port Huron-Sarnia, just at the conclusion of a sudden and severe storm of wind and rain which had greatly obscured the view on the river."

The St. Clair River runs southerly from Lake Huron to Lake St. Clair. At the entrance, on the Michigan side, is the city of Port Huron, and on the Canadian side, the city

of Sarnia. The collision happened some 400 or 500 feet from the Canadian shore, (R. 138, 249) where the river is about 1700 feet in width, there being an error in the record (p. 82) where the width is given as "700 feet." The King, a vessel some 580 feet in length (R. 58), was downbound; the Dixon, about 350 feet in length (R. 58), was upbound. The King, for a considerable time before the collision, had been navigating in thick weather on the Canadian side of the river.

Throughout the trial the old nomenclature was used, that is to say, when a vessel ported, it meant going to her own right. When she starboarded, it meant going to her own left. The District Court found both vessels at fault, the King for excessive speed and for violating a one-blast passing agreement; that is to say, in failing, after one-blast signals had been exchanged, to alter her course to her own starboard, or right, and so meet port to port. The Dixon was held at fault, on her own story, because knowing that the King was on the Dixon's starboard bow, that is, to the Dixon's right (looking ahead) and continued to be there after the first exchange of passing signals, she, the Dixon, as said by the District Judge (R. 250):

> "having already ported one half point, again ported her helm another point after receiving the second passing signal; and after the third was received and before she definitely located the position and course of the King, ported still more and came across the King's bows."

Two separate suits (consolidated for trial) were brought in Admiralty Court, the libel in the first (R. 2) being filed by Interstate Steamship Company, owner of the King, *in personam*, against Great Lakes Transit Corporation, owner of the Dixon. The second libel (R. 16) was filed, *in rem*, against the King by Great Lakes Transit Corporation "as owner of the Steamer 'George D. Dixon,' and as carrier and/or bailee of cargo lately laden on the

Steamer 'George D. Dixon'." This libel sought to recover both for the damage sustained by the Dixon and for the damage sustained by cargo carried on the Dixon, the proctors who signed the libel representing both the owner of the Dixon and the Dixon's cargo insurers. After the District Judge had filed his opinion holding both vessels at fault and ordering a division of the damages, petition for reargument was filed (R. 251) and overruled (R. 252), the Court stating that after "careful consideration" he could find nothing submitted for the Dixon that would induce him to change his conclusion, and he called particular attention to the case of *The Quoque*, 47 Fed. (2d) 873, as sustaining his ruling that the Dixon was at fault, adding:

> "I do not see how the decision could have been otherwise than it was, and the petition for reargument is denied."

The Dixon's cargo insurers, Atlantic Mutual and others, then (R. 253) filed an intervening petition seeking to recover back losses already paid and to be paid on account of damage to the Dixon's cargo.

On June 9, 1934 (R. 315) the District Judge filed opinion and decision in respect to the right of the cargo insurance to recover. On July 27, 1934 (R. 317) a supplemental opinion and decision was filed and on the same date (R. 319) interlocutory decree was filed. This decree adjudged both vessels at fault with consequent division of damages and as to the cargo insurance, provided in substance that cargo underwriters might recover back their losses, one-half from the King and the other half from the Dixon.

An appeal was taken and notice thereof, with petition and assignments of error, were filed on August 8, 1934. (R. 324, 326, 328.) Thirteen of the assignments of error pertain to the collision, thirty-one to the cargo insurance question. The Court of Appeals on June 5, 1936 filed opin-

ion (R. 348) affirming the District Court on both branches of the appeal,—the fault as to the collision and the award as to the cargo insurance. Also on June 5, (R. 347) decree was filed affirming the decree of the District Court. On July 3, 1936 Great Lakes Transit Corporation filed a petition for rehearing (R. 361), the petition, as well as the supporting brief (R. 364) being limited solely to the cargo insurance question, and there being no prayer for, nor suggestion as to, a rehearing on the finding that the Dixon was in fault with respect to the collision. The prayer of the petition for rehearing (R. 362) reads:

> "Wherefore, your petitioner prays that a rehearing may be granted to it in this cause, upon the issue as to the rights of the Atlantic Mutual Insurance Company and similarly situated underwriters."

The Statute, 28 U. S. C., Sec. 350, provides that an application for certiorari shall be made within three months after the entry of the judgment or decree in the lower court. As has been shown, the decree of the Court of Appeals was filed June 5, 1936, and no petition or motion was made for a rehearing as to the collision case. True, a petition was filed asking for a rehearing as to the insurance question, but the record shows clearly that the owner of the Dixon was quite content to accept the judgment of the two lower courts that the Dixon should be held at fault. Now, however, the petition for certiorari seeks to have this Court review the collision liability as well as the cargo insurance controversy.

ARGUMENT.

We discuss the collision question only. Respecting the rights of the cargo insurers, the King, as in the lower courts, is not concerned. As stated in the opinion of the Court of Appeals (R. 355), the King, in the answer filed to the insurers' intervening petition,

"asked that its rights be preserved and that a decree be entered, showing that the King and the Dixon were mutually at fault and dividing the damages and costs equally between the owners of the steamers."

No appeal from the District Court was taken for the King because, while not all the findings of the District Judge as to her navigation were accepted, the proof as to her speed was sufficient to condemn her.

The Court of Appeals adopted the findings of the District Court as to the navigation of the two ships, including speed, location, distances and signals.

The District Judge found (R. 248):

"When the vessels came into each other's view they were, according to the more satisfactory evidence, 400 or 500 feet apart."

and the further findings on the Dixon's own testimony were (R. 249):

"The testimony from the Dixon is that on hearing the fog signal of the King, her lookout reported a ship ahead, which the mate thought was a little on the starboard bow. When the King's first passing signal of one blast was received, the lookout reported it a trifle on the starboard bow, and Capt. Goodberry ordered the helm ported one half point. The lookout then heard the King's second passing signal and reported a ship one half point off the starboard bow, whereupon the captain ordered a further change of the helm of an additional point to port.

After receipt of the third one-blast signal, Capt. Goodberry testifies he told his wheelsman to port again and keep her coming. He then heard the King's alarm, saw her flash on his port side and heard a two-blast signal and the King came into full view. Seeing no chance of making the starboard passing as requested, he blew one whistle and shouted 'Hard aport.'

* * *

* * * it must be found * * * after the Dixon had ported one half point, because of the steamer

ahead, the second passing signal of the King and the report of the lookout notified Capt. Goodberry that the approaching steamer was still about half a point off to starboard, whereupon he ordered the Dixon ported another point; and that after the third exchange of one-blast signals but before the King's alarm and when it was apparent that the other vessel was close and still approaching the course of the Dixon, Capt. Goodberry gave his wheelsman an order to port again and keep her coming."

The District Court's conclusion from the findings was (R. 249):

"Under these circumstances, and when after the Dixon's first change of course to starboard, it was discovered that the King continued on in her direction, Capt. Goodberry should have appreciated that the approaching vessel was being very badly navigated or was laboring under some serious misunderstanding and that there was risk of collision unless the Dixon took prompt steps to prevent it. He should then have sounded alarms and stopped her headway. • • •

• • • the Dixon, having already ported one half point, again ported her helm another point after receiving the second passing signal; and after the third was received and before she definitely located the position and course of the King, ported still more and came across the King's bows. Counsel for the Dixon say it was her duty to keep to starboard under her passing agreement, with which she had the right to assume the King would comply. But when it became apparent that the King was not complying, the duty arose to meet the new situation by the exercise of such precautions as prudent navigation required. The Dixon changed her course without knowing where the King would be found, instead of adopting the simple precautions against collisions in thick weather, provided by the rules, and for this she must be found negligent." Citing *The North Star* (C. C. A. 6), 62 Fed. 71; *The Roby* (C. C. A. 6), 111 Fed. 601; *The Quoque* (C. C. A. 2), 47 Fed. (2) 873.

Paraphrased, the glaring and condemnatory faults of the Dixon were that, having heard a fog signal off her starboard bow, and after having heard and accepted a one-blast, or port to port, passing signal, from the approaching vessel, still off her starboard bow, but hidden from sight by the rain and fog, and having ported half a point to effect a passing, later, on hearing a second one-blast signal, still off her starboard bow, with the approaching vessel still hidden from view, the Dixon, when she should have known it was a dangerous situation and should have stopped and blown an alarm, instead answered with one blast, inviting the King to come on, and ported again, this time a point, and ported still more on receiving and accepting a third one-blast signal. The Dixon thus knowingly swung directly toward and across the course of the down bound King.

Petitioner's brief, page 3, and following, undertakes to argue that technically the pilot of the Dixon did not violate Rules 23 and 26 of the Navigation Rules of the Great Lakes (White Law) 33 U. S. C. Secs. 288 and 291, and therefore should be held blameless. Now, as well as in briefs and arguments in the courts below, petitioner makes a basic error in assuming that each of the statutory Navigation Rules stands isolated and by itself and is inclusive, whereas courts of high authority have held that statutory rules of navigation and particularly the rules now under discussion must be construed together and that with them there must be applied general rules of good seamanship and cautious navigation as determined by courts of admiralty.

A "preliminary" statement to the Pilot Rules published under governmental authority, and in which are included the statutory rules of the White Law, reads:

> "*Risk of Collision* can, when the circumstances permit, be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does

not appreciably change, such risks should be deemed to exist." (Italics in text.)

One of the first Great Lakes collision cases decided after the adoption of the White Law in 1895 was *The George W. Roby* (C. C. A. 6) 111 Fed., 601. Judge Lurton wrote the opinion and said, page 609, that the rules of the White Law, including Rules 23 and 26, must be read and construed together. Then, referring to the language of Rule 28 of the White Law, 33 U. S. C. 293, that a vessel shall not be exonerated from the consequences "of a neglect of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case" it is said that the "cautious" navigation required under Rule 15 or the precautions that should be taken by vessels approaching each other in a fog, depends upon the special circumstances and in the determination of any question arising out of the navigation of the ships, where the regulations prescribed by Congress do not expressly apply (609):

> "resort must be had to the sailing usages and principles of navigation which are not superseded by the positive terms of the statute. These rules or sea laws defining the precautions required by good seamanship and cautious navigation, are to be deduced from the decisions of courts of admiralty, and are not to be regarded as superseded, except in so far as they are inconsistent with the statutory regulations."

Respecting the relation between statutory rules of navigation and general maritime law, the Court of Appeals of the Second Circuit in *The George S. Tice*, 287 Fed., 127, at page 129, says:

> "But over and underlying all the rules of navigation is that rule of common sense, so often referred to, that no one has the right to run into collision."

The New York, 175 U. S., 187, not a fog case, but a standard and leading authority going to fundamentals, in-

volved a collision in the Detroit River. Both vessels were condemned, one of them because, having signaled the other, and receiving no answer, she failed to stop. As to this it is stated in the opinion by Mr. Justice Brown, that (201):

> "The duty of the Conemaugh at this juncture was plain, she should have stopped her engines after the second signal, and, if necessary to bring her to a complete standstill, have reversed them. Nothing is better settled than that, if a steamer be approaching another vessel *which has disregarded her signals or whose position or movements are uncertain she is bound to stop until her course be ascertained with certainty.*" (Italics ours.)

On page 205, the following language is quoted from *The Sunnyside*, 91 U. S., 208, 222:

> "Cases arise in navigation where a stubborn adherence to a general rule is a culpable fault, for the reason that every navigator ought to know that rules of navigation are ordained not to promote collisions, but to save life and property by preventing such disasters."

An often quoted declaration from the opinion in *The New York* as to the underlying responsibility of those in charge of the navigation of ships is (p. 207):

> "She," referring to one of the ships involved in the collision, "should have known that if she continued her course a collision would be inevitable, and yet she did not stop or reverse. Her conduct was inexcusable. The lesson that steam vessels must stop their engines in the presence of danger, or even of anticipated danger, is a hard one to learn, but the failure to do so has been the cause of the condemnation of so many vessels that it would seem that these repeated admonitions must ultimately have some effect."

Applying these rules,—statutory and of the Admiralty Courts,—to the case of the Dixon, the District Court was

right in saying that when the Dixon knew that notwithstanding the exchange of one-blast signals, the King still remained on her starboard bow, then the Dixon should have sounded an alarm, stopped and reversed. The Court of Appeals likewise was correct in its declaration that the master of the Dixon

> "could not forego any precaution on his part simply because the King was being badly navigated. The failure to blow a danger signal in the face of the King's palpable confusion in blowing a second port to port passing signal when it was still in line for a starboard passing, was negligence."

Petitioner's brief, page 13, says "Research discloses no case where one vessel has been condemned for failing to supervise the navigation of another." This argument fails entirely to reach the situation. It is not a question of the navigator of one ship supervising the navigation of the other, but it is a question of the navigator of one ship being bound to take cognizance of the obvious failure of the other ship properly to navigate. That is the doctrine of *The New York, supra,* and it is the doctrine announced by the Court of Appeals, Sixth Circuit, in *Duluth S. S. Co. v. Pittsburgh S. S. Co.*, 180 Fed., 656. This was a case of collision between the steamers Sylvania and Bessemer, happening just as a fog was clearing, and is very similar to the present case of the King-Dixon. It was held that the Sylvania clearly was at fault, but in the District Court the Bessemer escaped condemnation. The Court of Appeals, however, on the Bessemer's own story, found her at fault also, saying (opinion, page 659) that after danger became clearly apparent to the Bessemer, she was not stopped nor were danger signals given and on the authority of *The New York, supra,* the Bessemer was condemned, the court saying:

"The master of the Bessemer saw that the Sylvania was not doing her duty under the passing agreement which he says had been reached, and that, if her course was kept up, a collision was inevitable, yet he relied upon the Sylvania to change her course so as to pass according to the agreement as the Bessemer understood it, and he continued to rely upon the Sylvania to avert the accident, until it was too late for either to do so.

To the Bessemer it was a clear case of apparent danger of collision, with time to avoid it. She could have stopped or blown the danger signal when it was first apparent that the Sylvania was less than three-quarters of a mile away, moving rapidly, and in violation of the passing agreement."

The rule for which we contend was applied also in the *Elphicke-Poe* (C. C. A. 6), 123 Fed., 405 (not a fog case). Judge Lurton, afterwards Mr. Justice Lurton, who had so well defined the relation of the statutory rules of navigation and general "sea laws" in *The George W. Roby, supra,* was a member of the Court in the *Elphicke-Poe* case. The facts as to the relative situations of the King and Dixon, just preceding the collision, as claimed by the Dixon and found by the trial court, make the case almost identical in that respect (as to the situation, one ship to the other) to the reported case of the *Elphicke-Poe,* where the collision happened in the St. Clair River about 400 feet out from the Canadian Shore and not far from the place where the King and Dixon came together. The Elphicke was downbound, the Poe upbound. They exchanged one-blast passing signals, thus agreeing to a port to port meeting. The downbound ship, the Elphicke, failed to alter her course sufficiently to her starboard or right. A collision resulted. The Poe manifestly was at fault for not directing her course to her starboard, as the Elphicke had a right to assume she would. For the Elphicke, as for the Dixon in the pending case, it was argued, quoting from the opinion

(p. 406) "that one of two meeting vessels has a right to expect that the other will do her duty and may govern her own course in that expectation," citing *The Victory* and *The Plymothian,* 168 U. S., 410, a case relied upon by petitioner (Br. pp. 8, 12, 14, 15), but the court held, not that the Elphicke should have "been condemned for failing to supervise the navigation" (Br. 13) of the Poe, but that the Elphicke, with a collision impending, should have tried to avoid it. The Poe, the court found, "had plenty of room and time in which to avoid the disaster after the danger of it began to appear." (p. 406.) Seeing the Elphicke out of her proper place, the Poe "depended on the Elphicke to retrieve her fault and refused to vary her own course." The opinion continues "The law gives no countenance to such perversity, but, on the other hand, exacts of each vessel that, notwithstanding the errors of the other, it shall to the end do all in its power to avoid the consequences of the fault."

In *The Quoque* (C. C. A. 2), 47 Fed. (2d) 873, referred to by the District Judge in his opinion (R. 250) and also in overruling the motion for rehearing (R. 252), much reliance was placed on *The Victory* and *The Plymothian, supra,* but the Court, citing, among other cases, *The New York, supra,* and *The Albert Dumois,* 177 U. S., 240, said (p. 874) that independently of what the Pilot Rules may require, the courts have very definitely declared that there is a duty to stop and reverse as soon as danger of collision is seen to exist, because of doubt as to what the other vessel may do.

So, as to the Dixon, she heard repeatedly, and finally also saw, the King off her starboard bow, notwithstanding the passing agreement called for the King to get over on the Dixon's port bow, but instead of blowing an alarm or stopping and reversing, or both, the Dixon kept on a course right across the King's bows.

These cases of *The New York, The Albert Dumois,* the *Sylvania-Bessemer,* the *Elphicke-Poe,* and *The Quoque,* meet the fallacy of the suggestion in petitioner's brief as to one vessel supervising the navigation of the other. The law is that one vessel seeing another vessel being badly navigated should herself navigate so as, if possible, to avoid impending disaster. When the Dixon became aware that the King was not observing the one-blast passing agreement, she should have blown an alarm and stopped.

Petitioner's brief, page 13, seeks to have the "gross fault rule" applied. This question was raised also in the lower courts and in respect thereto the District Court said (R. 250):

> "The Dixon and her owners may not escape responsibility under the rule requiring evidence of her fault to be clear and convincing, assuming such rule to apply. All evidence on that point against her comes from her master and crew, and the court has made no 'over scrupulous search for possible faults' with which to charge her. *Steffens v. U. S.,* 32 F. (2d) 206. The negligence here was of the character found in *Lie v. San Francisco & Portland S. S. Co.,* 243 U. S. 291, and both vessels will be found at fault and the damages divided accordingly."

The case of *Lie v. San Francisco & Portland S. S. Co.,* cited by the District Court, should be quite sufficient authority on this question. In the syllabus is this language:

> "When a collision is attributable to the palpable negligence of both masters, the negligence of each continuing to operate as an efficient cause until the moment when the accident occurs, the doctrine of major and minor fault does not apply."

We add, however, *The Albert Dumois,* 177 U. S., 240, where, at page 253, this Court, through Mr. Justice Brown, said:

> "This Court has repeatedly held the fault, and even the gross fault of one vessel, does not absolve the other

from the use of such precautions as good judgment and accomplished seamanship require."

The faults as to the collision were passed upon three times, twice in the District Court,—on the original hearing and on the motion for rehearing,—and once by the Circuit Court of Appeals, and each time the Dixon was condemned. The point now principally argued in the petition for certiorari, that the Dixon did not violate any statutory rule, was advanced in the petition for rehearing in the District Court, where, in the memoranda overruling the motion (R. 252), the Judge said that under "the general duty of careful navigation 'independently of what the Pilot Rules may require' " he could not see how the Dixon could be exonerated. In the Court of Appeals this same question was argued and the court determined that the master of the Dixon (R. 354) "could not forego any precaution on his part simply because the King was being badly navigated."

The trial court and the appellate court both having found that on the facts the negligence of the Dixon was a cause contributing to the collision, a review by this Court as to the collision should be denied.

Respectfully submitted,

FREDERICK L. LECKIE,
THOMAS H. GARRY,
Proctors for Respondent,
Interstate Steamship Company.

DUNCAN, LECKIE, MCCREARY,
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Counsel.

February 23, 1937.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 716

GREAT LAKES TRANSIT CORPORATION,
Petitioner,

against

INTERSTATE STEAMSHIP COMPANY and ATLANTIC MUTUAL INSURANCE COMPANY, *et al.*, Intervening Underwriters,
Respondents.

BRIEF ON BEHALF OF RESPONDENTS-INTERVENING UNDERWRITERS WITH RESPECT TO PETITION FOR WRIT OF CERTIORARI.

RAY M. STANLEY,
ELLIS H. GIDLEY,
Counsel for Respondents-Intervening Underwriters.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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IN THE

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GREAT LAKES TRANSIT CORPORATION,
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INTERSTATE STEAMSHIP COMPANY and ATLANTIC MUTUAL INSURANCE COMPANY *et al.*, Intervening Underwriters,
Respondents.

BRIEF ON BEHALF OF RESPONDENTS-INTERVENING UNDERWRITERS WITH RESPECT TO PETITION FOR WRIT OF CERTIORARI.

The petition presents two unrelated questions. These respondents are directly interested only in the second question and limit discussion herein accordingly.

The action is brought to establish liability and cross liability between petitioner's Steamer GEORGE D. DIXON and the Interstate Steamship Company's Steamer WILLIS L. KING for hull and cargo damage arising out of collision. The claim for cargo damage, for the enforcement of which these respondents later intervened, was made by petitioner as carrier and/or

bailee against the Steamer KING and its owner; and the latter then pleaded against petitioner and its Steamer DIXON with respect thereto under the 56th Admiralty Rule. The Court held that both vessels were at fault for the collision and thereupon the question presented by petitioner arose.

These respondents intervened following the determination of mutual fault. The position then asserted and since adhered to by these respondents is that their policies insured cargo; that the payments made thereunder were for cargo's benefit; that they seek to enforce the rights of cargo which they acquired by subrogation; and that, therefore, the KING being at fault, they are entitled to a decree for full damage against that vessel, leaving it to obtain the recoupment allowed by law against the DIXON. This position is based upon the authority of *The New York*, 175 U. S. 187, 209, 210; *The Chattahoochee*, 173 U. S. 540, 554, 555; *Erie Railroad Co. v. Erie & Western Transportation Co.*, 204 U. S. 220, 226; *Aktieselskabet Cuzco v. The Sucarseco*, 294 U. S. 394, 400, 401.

Petitioner contended that the policies of insurance were not cargo policies, but were policies of indemnity insuring its liability as carrier; and petitioner therefore urged that the underwriters acquired no rights of cargo by subrogation; and furthermore that they should not be permitted to recover against the KING because the KING would then be entitled to recoup one-half thereof from the DIXON, which, as petitioner claimed, was the insured under the policies in question.

The Court held that the policies were cargo policies, that the claims prosecuted by these respondents were

cargo claims acquired by subrogation and that full recovery should be had. The Court determined, however, that in view of the fact that both vessels, each of which had been condemned, were before the Court, the form of the decree should be for a moiety of the damage against each with contingent liability of each for the moiety decreed against the other. The effect of the decree is to accomplish the ultimate unavoidable result, namely, requiring each vessel to bear one-half of the damage resulting from the collision—a consequence of the collision plainly to be foreseen. The decree, therefore, has the effect of fixing and enforcing ultimate liabilities of the parties in avoidance of circuity.

These respondents, standing in the shoes of innocent cargo, having the clear right of recovery in full from the non-carrying vessel irrespective of any relationship with the carrying vessel; *The New York, supra; Aktieselskabet Cuzco v. The Sucarseco, supra;* and the non-carrying vessel having the equally clear right of recoupment of one-half thereof from the carrying vessel; *The Chattahoochee, supra,* the decree below obviously accomplishes substantial and direct justice between all the parties.

These respondents appreciate, however, notwithstanding the manifest correctness of the decree of the District Court and of the decision of the Circuit Court of Appeals affirming it, that the question here presented is of such substantial importance to shippers and carriers by water that the final authoritative decision of this Court is desirable, even though the effect be to affirm the decree of the Court below.

If this Court determines to review the matter, it is respectfully submitted that all parties to the action should be retained and brought before the Court so that none may be prejudiced by the absence of another and so that substantial justice between all of them may be assured.

Respectfully submitted,

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ELLIS H. GIDLEY,
Counsel for Respondents-Intervening Underwriters.

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In the Supreme Court of the United States

OCTOBER TERM, 1936.

No. 716.

GREAT LAKES TRANSIT CORPORATION,
Petitioner,
AGAINST
INTERSTATE STEAMSHIP COMPANY
and
ATLANTIC MUTUAL INSURANCE COMPANY, *et al.*,
Intervening Underwriters,
Respondents.

STATEMENT FOR INTERSTATE STEAMSHIP COMPANY, A RESPONDENT, OWNER OF THE STEAMER WILLIS L. KING.

FREDERICK L. LECKIE,
THOMAS H. GARRY,
Counsel for Respondent,
Interstate Steamship Company.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

In the Supreme Court of the United States

OCTOBER TERM, 1936.

No. 716.

GREAT LAKES TRANSIT CORPORATION,
Petitioner,

AGAINST

INTERSTATE STEAMSHIP COMPANY
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ATLANTIC MUTUAL INSURANCE COMPANY, *et al.*,
Intervening Underwriters,
Respondents.

STATEMENT FOR INTERSTATE STEAMSHIP COMPANY, A RESPONDENT, OWNER OF THE STEAMER WILLIS L. KING.

The review in this Court (R. 142) is "limited to the second question presented by the petition for writ of certiorari," which question relates to a controversy between petitioner, as owner of the steamer George D. Dixon, and the insurers of cargo being carried on that steamer at the time of the collision between the Dixon and the steamer Willis L. King, owned by respondent, Interstate Steamship Company. The District Court filed opinion (R. 31) holding that the collision was due to mutual fault of the two steamers and that the damages should be divided. Thereafter (R. 42) a petition of intervention was filed by cargo insurers in which they asked to recover from the King the amounts paid and to be paid on account of cargo damage. To this intervening petition the owner of the King filed an answer (R. 101) asking that its rights be preserved and

that a decree be entered showing the King and Dixon mutually at fault and dividing the damages equally between the owners of the steamers, and also petitioned in the Dixon's owner to answer cargo underwriters' intervening petition. The interlocutory decree (R. 108) adjudged both vessels at fault for the collision and that all resulting damages should be divided equally between the two owners, and as to the insurance question raised by cargo underwriters, adjudged that the cargo underwriters should recover a moiety of the cargo damage from each of the steamers and their respective owners. The Court of Appeals affirmed both as to collision liability and as to the cargo insurance controversy.

Respecting the dispute between the owner of the Dixon and the cargo insurers, the owner of the King is not concerned, for it expects to make settlement on the basis of equal division of the total damages, including cargo damage. This position is recognized throughout the Dixon's Brief, as at page 16, where it is said:

> "The only parties interested in the question under review are petitioner and intervening underwriters. • • • The Interstate Steamship Company is not interested since • • • it has protected itself by asking that the cargo damages and costs 'be equally divided between the owners of said steamers' (R. 104) with the result that under the holding of mutual fault it can only be called upon to pay a moiety of the cargo damage in any event."

The Brief for cargo underwriters also starts with the statement (page 1) that by order of this Court the review is limited "to the second question presented by the petition for writ of certiorari," which is the cargo insurance question.

Therefore, as in the Court of Appeals, this respondent, Interstate Steamship Company, owner of the King, now

requests only that the resulting decree, based upon mutual fault of the two steamers, shall provide for an equal division between the two owners, of the total damages, including cargo damage, arising from the collision.

Respectfully submitted,

FREDERICK L. LECKIE,

THOMAS H. GARRY,

Counsel for Respondent,
Interstate Steamship Company.

April 6, 1937.

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CHARLES ELMORE

Supreme Court of the United States

October Term, 1936.

No. 716.

GREAT LAKES TRANSIT CORPORATION,
Petitioner,

against

INTERSTATE STEAMSHIP COMPANY AND ATLANTIC MUTUAL INSURANCE COMPANY, *et al.,*
Respondents-Intervening-Underwriters.

BRIEF OF ATLANTIC MUTUAL INSURANCE COMPANY, et al., RESPONDENTS-INTERVENING UNDERWRITERS.

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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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Supreme Court of the United States

October Term, 1936.

No. 716.

GREAT LAKES TRANSIT CORPORATION,
Petitioner,

against

INTERSTATE STEAMSHIP COMPANY AND ATLANTIC MUTUAL INSURANCE COMPANY, *et al.*,
Respondents-Intervening-Underwriters.

BRIEF OF ATLANTIC MUTUAL INSURANCE COMPANY, et al., RESPONDENTS-INTERVENING UNDERWRITERS.

Certiorari granted the 8th day of March, 1937, limited by order of this Court to the second question presented by the petition for writ of certiorari (R. 142), to review the order and decree of the United States Circuit Court of Appeals for the Sixth Circuit, affirming the decree of the United States District Court for the Northern District of Ohio, Eastern Division (Judge S. H. West sitting) (R. 123); and to review the order of the Circuit Court of Appeals denying petitioner's motion for rehearing herein (R. 142).

Thus limited, the pertinent portion of the decree brought here for review adjudged that Atlantic Mutual

Insurance Company and other similarly situated underwriters, who intervened following trial of the consolidated cause and finding of mutual fault, issued policies of insurance primarily for the benefit of cargo laden on the "Dixon" at time of collision and, because of mutual fault, were entitled through subrogation, to recover from the owner of each of the colliding vessels a moiety of all payments made on account of loss and damage sustained by the "Dixon's" cargo by reason of the collision, with right of recovery over from either vessel of any balance uncollectible from the other.

The opinions of the District Court (R. 104-107) are not officially reported. The opinion of the Circuit Court of Appeals (R. 123) is reported at 86 F. (2d) 740.

Statement of the Case.

Inception of the Case.

By reason of collision occurring August 11, 1933, in St. Clair River between the Steamer "George D. Dixon," owned by petitioner and the Interstate Steamship Company's Steamer "Willis L. King," each vessel together with cargo laden on the "Dixon" sustained substantial damage.

The action is a consolidated cause brought to establish liability and cross liability between the vessels involved in the collision. The owner of the "King" filed libel against petitioner *in personam* for recovery of the damage sustained by the "King" (R. 2-5).

The petitioner, as owner of the "Dixon," and as carrier and/or bailee of cargo laden thereon, filed libel *in rem* against the "King" and *in personam* against the Interstate Steamship Company, her owner (R. 10-15). The latter pleaded therein against petitioner as owner of the "Dixon" under the 56th Admiralty Rule with respect to cargo damage (R. 20-23). Answer to the impleading petition was filed by petitioner, as owner of the "Dixon"; and also to its own libel (R. 24-28). No answer was, however, filed by petitioner in its representative capacity on behalf of cargo and no claim was made by cargo as against the "Dixon".

Upon the trial, the suits were consolidated and proofs were taken upon the question of fault alone. The District Court wrote an opinion holding both vessels at fault, and directing that the damages be divided accordingly, with the usual order of reference (R. 31-40).

The Contentions Respecting Insurance.

Atlantic Mutual Insurance Company then intervened for its interest as insurer of the cargo of the "Dixon", having insured thirty per cent of the total insurance issued. The intervening petition alleged that the cargo of the "Dixon" was shipped pursuant to contract of carriage between the owners, shippers and consignees of cargo, and the carrier (petitioner here), whereby the carrier agreed to provide insurance upon the cargo against the perils of the seas and lakes, including collision (R. 43); that the intervenor, by a policy of insurance thereafter issued to the carrier "*for the account of whom it may concern*" on cargo carried on the

"Dixon" during the season of 1933, insured the owners, shippers and consignees of cargo laden on the "Dixon" at the time of collision upon said cargo against the perils of the seas and lakes, including collision and also against claims for general average contributions, to the extent of thirty per cent of $1,100,000.00, the remainder of which insurance was provided by other underwriters (R. 43); that the libel theretofore filed by the Transit Corporation, as owner of the "Dixon" and as carrier and/or bailee of her cargo, against the "King" and her owner alleged sole fault upon the part of the "King" in specified particulars (R. 43, 44); that the sum of $6401.57, being thirty per cent of the then ascertained amount of loss and damage to cargo, had been paid to the carrier for the account of owners, shippers and consignees of cargo by reason of damage sustained as a result of the collision, and that the similar percentage of the balance of cargo damage and loss sustained, including general average charges when ascertained, would be likewise paid, whereby petitioner had become and would become subrogated to the rights of cargo (R. 45); that, through such subrogation to the rights of cargo owners and shippers, the intervenor had acquired and possessed a right of recovery against the "King" and her owner on account of the collision for the sums paid and to be paid (R. 45).

It was stipulated by all parties that the intervening petition of Atlantic Mutual Insurance Company stand as the intervening petition of fourteen other similarly situated underwriters who issued the remaining seventy per cent of the insurance under similar policy conditions (R. 46-49).

The petitioner answered the intervening petition (R. 96), reiterating freedom from fault upon the part of the "Dixon". It affirmatively asserted that by reason of the provisions of the tariffs and bills of lading covering the "Dixon's" cargo, the carrier intended to and did assume liability for all cargo loss and damage, including general average charges, resulting from collision or other sea perils, and that the carrier had accordingly become liable to pay all losses sustained by cargo as the result of the collision; that it had paid and would pay claims made on account of cargo loss and damage; that intervening underwriters possessed no rights, except as derived through the carrier, under the policies of insurance which, it was alleged, insured and indemnified the carrier against the liability assumed by it to cargo resulting from collision and other sea perils. In the event of an ultimate decree of mutual fault, it was asserted that the damages should be equally divided with a provision treating all cargo loss paid by the carrier as a loss sustained by it for its own account as a result of the collision (R. 96-101).

The owner of the "King" also answered the intervening petition asserting that trial had been had, mutual fault found with a direction of a division of damage, and asking that its rights be preserved accordingly (R. 101-104).

A stipulation of facts with attached documentary exhibits was entered into by all parties for the purpose of permitting the Court to pass upon the legal rights of intervening underwriters with respect to the form of the interlocutory decree to be entered (R. 49-56). The issues presented upon the pleadings and stipulations

were then presented to the Court for determination upon settlement of the interlocutory decree.

The position urged by intervening underwriters was that their policies insured cargo; that the payments made thereunder were for cargo's benefit; that enforcement of the rights of cargo acquired by subrogation was sought, and that, therefore, the "King" being at fault, they were entitled to a decree for full damage against that vessel leaving it to obtain the recoupment allowed by law against the "Dixon". This position was based upon the authority of the following decisions of this Court:

The New York, 175 U. S. 187, 209, 210;
The Chattahoochee, 173 U. S. 540, 554, 555;
Erie R. R. Co., v. Erie & W. Transp. Co., 204 U. S. 220, 226.

Decision of the Insurance Question.

The District Court wrote an opinion (R. 104-105) the effect of which was to sustain the underwriters' claim to enforcement of subrogation. It was held, because trial had been had and mutual fault found, "the underwriters are entitled to enforce the liability of the "King" and the "Dixon" each for a moiety of the cargo losses" (R. 105). The Court mistakenly, as it subsequently appeared, directed entry of the decree presented on behalf of the carrier.

On the following day, the Court discovered this error and advised counsel in a letter in which it was stated that the opinion should have expressed the view that the "insurance was paid for by and was primarily for

the benefit of cargo owners'' (R. 106). It was directed that a further decree in conformity with the opinion be submitted.

After considering further argument, the Court wrote a supplemental opinion (R. 107-108). As we read it, the Court determined:

1. That the cargo owners are the real beneficiaries of the insurance.
2. That the petitioner assumed to the shippers an obligation to provide marine insurance on their cargo.
3. That the petitioner also assumed the common law obligation of a carrier to carry safely.
4. That the policies recognize and cover both differing liabilities of the carrier.
5. That shippers were entitled to have the protection of marine insurance as well as of the carrier's common law liability.
6. That when the loss occurred, the rights of all the parties became fixed and were not affected by the payment by the carrier of the losses out of its own funds on the theory that it could thus deal with the liability as one for loss of cargo and deny the underwriters' right of subrogation.

Decree in accord with the Court's direction was entered (R. 108-113).

Petitioner appealed to the Sixth Circuit Court of Appeals, assigning error both with respect to the finding of mutual fault and also with respect to the determination respecting insurance. The Circuit Court of Appeals affirmed the decree of the District Court as to both parts of the appeal (R. 123-134).

The opinion of the Circuit Court of Appeals upon the insurance point first held that the wording of the eleven tariffs under which the "Dixon's" cargo was carried were each so worded as to waive the provisions of the Harter Act (R. 131). The Court reviewed the applicable language of the tariff schedules, and determined from these terms and conditions for the carriage of cargo, that the owners of cargo would naturally conclude that their property was to be covered by marine insurance. It was then held:

> "and we think the policies in suit were procured by appellant in compliance with its contracts and were issued primarily for the benefit of cargo owners" (R. 132).

The Court then considered various provisions of the policies of insurance which it deemed to be indicative of an intent to procure coverage upon cargo and reached this conclusion:

> "But this clause does not avail appellant because it did not take upon itself the insurance of cargo or assume any liability with reference thereto as an insurer. Its obligation as to insurance went on further than to require it to procure policies of insurance from others. We think the parties could not have failed to understand that these policies were issued primarily for the benefit of cargo and that the payments made and to be made by the underwriters were in settlement of their liability to cargo owners" (R. 133).

It was accordingly determined that by reason of the affirmed finding of mutual fault, there was no error in decreeing a recovery against each vessel of a moiety of the payments made, and to be made, by the underwriters on account of loss to cargo, with the provision for payment by one of any balance uncollectible from the

other (R. 133). The decree below was affirmed (R. 134).

Petitioner sought rehearing (R. 134-142) which was denied (R. 142).

Thereupon ensued application for certiorari.

Basis of the Decree Below.

By its specifications, in support of petition for writ of certiorari, petitioner asserts error upon the part of the Circuit Court of Appeals in affirming the interlocutory decree entered in the District Court. It is thought requisite, therefore, to point out the basis of the decree below.

The libel filed by petitioner, as owner of the "Dixon" and as carrier and/or bailee of cargo, alleged collision with the "Dixon" by the "King" by reason of the asserted sole fault and negligence upon the part of the "King"; and that the ensuing damage, both to the "Dixon" and her cargo, was solely the result of the fault and negligence of the "King" against which a lien was claimed (R. 10-15).

By their intervening petition, in addition to the allegations respecting the carrier's agreement to provide insurance and the issuance by underwriters of policies of insurance "for account of whom it may concern" insuring the "Dixon's" cargo, underwriters alleged the filing of the libel by the owners of the "Dixon" against the "King"; that sole fault upon the part of the "King" was therein charged and restated

the particular faults asserted (R. 43-44). In addition to their claim of subrogation to rights of cargo owners and shippers through payment of cargo loss and damage, it was further alleged that the collision was due to the fault and negligence of the "King" and her owner in the respects stated in the libel (R. 45).

It is thus apparent that the cause of action, asserted first by petitioner in behalf of cargo and subsequently by intervening underwriters claiming subrogation to cargo rights, is solely based upon the fault and negligence of the "King" in causing the collision and ensuing damage. There is no suggestion in the record of a claim on behalf of cargo that the "Dixon", or its owner, was liable to cargo because of a breach of the carrier's contract of carriage. The only party claiming fault upon the part of the "Dixon" was the owner of the "King", and its plea was based upon negligence. It must be understood, therefore, that the cause proceeded in behalf of cargo as one for negligently causing the damage sustained.

Both the "King" and "Dixon" were found at fault upon the trial, and division of damage was accordingly directed (R. 31-40). That decision of the District Court, by reason of affirmance by the Circuit Court of Appeals and subsequent denial of certiorari with respect thereto by this Court, is final and constitutes the law of the case.

The right of cargo to recover was thereby determined. It was determined upon the pleadings and issues then before the Court. The determination was not and could not be that the "Dixon" was liable

for breach of contract—that was not in the case in either pleadings or proofs. The determination was that cargo could recover because of the negligent operation of both vessels. Then these underwriters intervened to stand in cargo's place as subrogees—to collect what was collectible on cargo's behalf by reason of the Court's determination already made. The only question which then arose, indeed, the only question which could then arise, was whether they had acquired, by subrogation, the rights of cargo; whether they had the right as cargo's subrogees to receive the benefits flowing to cargo by reason of the determination that cargo could recover its damages because both vessels were negligent.

In reaching its decision upon that question, the District Court concluded that petitioner agreed with cargo owners and shippers (1) to provide insurance against marine perils, and (2) to assume the liability of a common carrier as at common law; that the insurance procured from intervening underwriters insured both cargo and petitioner's liability with respect to cargo; that cargo paid the insurance premiums under the rates charged, and that the insurance was primarily for its benefit; and that, upon payment of the loss and damage sustained by cargo, intervening underwriters became subrogated to all the rights of cargo, which right of subrogation could not be defeated by the carrier's act of payment of losses since the rights of the parties became fixed by reason of the occurrence of the collision (R. 104-108). This had nothing to do with the right of cargo to recover—that had already been determined. It related only to the right of underwriters to stand in cargo's place.

The Circuit Court of Appeals in considering the appeal as to this point expressed the view that under the tariff provisions petitioner had waived the saving provisions of the Harter Act; and in affirming the decree further held that, in compliance with the terms of the contract of carriage, petitioner procured the policies of insurance primarily for the benefit of cargo owners, and hence that the payments made in settlement of insurer's liability to cargo owners were properly recoverable through subrogation (R. 123, 130-134).

The ultimate contention of petitioner is that intervening underwriters may not enforce the rights which they obtained from cargo owners so as to require petitioner to pay a liability with respect to cargo, for as to such liability petitioner urges that it was itself insured by the same underwriters under the same policies and had itself paid the losses.

Based upon the consideration pointed out, it does not follow from the decree that the rights of cargo acquired by intervening underwriters are enforced against petitioner as a direct liability to cargo or that petitioner has been found liable by reason of its relation with cargo.

Rather is the decree supported upon the following principles: That two vessels colliding as the result of mutual fault are joint *tort feasors;* that as between themselves each vessel is required to bear one-half of all loss and damage resulting from the collision as to which *either* of them is legally liable; and that with all parties before the Court the amount of damage is equally apportioned and recovery decreed accordingly

against each vessel; that with but one of the offending vessels before the Court the apportionment for mutual fault cannot then be made but is apportioned in further proceedings for contribution from the remaining offending vessel. Having held that the policies were primarily for the benefit of cargo and that full recovery should be had by underwriters through subrogation, the Court in applying these principles, determined that since both vessels, each of which had been condemned in fault, were before the Court, it was proper to determine the ultimate responsibility and to apportion the cargo damage by awarding a decree for a moiety as against each vessel; thus enforcing ultimate liabilities in avoidance of circuity.

It is submitted that the "Dixon" has been decreed to pay, *not a liability in respect to cargo,* but in effect, a liability to the "King" arising out of collision under the established doctrine requiring both vessels mutually at fault to each pay one-half of all resulting loss or damage for which *either* of them is legally liable. It follows that petitioner in responding to the decree, will not pay a liability against which it was insured under the policies.

The Wyman, Partridge Rate Case.

In the Statement of Facts contained in its Brief, petitioner quotes copious excerpts from the opinions of the Interstate Commerce Commission in the case of *Wyman, Partridge & Co., et al. v. Boston & Maine R. R., et al.,* (1908) 13 I. C. C. 258; (1909) 15 I. C. C. 577. Based upon these excerpts petitioner thereafter urges the controlling effect of the decisions in that case upon

the instant cause. Subsequently at pages 38-40 of its Brief, petitioner cites the decision in the case of *The Grecian*, 78 F. (2d) 657, (C. C. A. 2); certiorari denied by this Court (299 U. S. Advance Sheets 1 p. XXVI). In the latter case, the facts were considerably variant from those at bar in that no policies of insurance were under consideration as to application of their insuring clauses; and the decision rested upon the construction accorded the bill of lading and tariff provisions there employed. Nevertheless, it appears that in the case of *The Grecian, supra*, the appellant strongly urged the *Wyman, Partridge* decisions as a controlling authority upon the similar contention made in the instant cause by petitioner. The Circuit Court of Appeals for the Second Circuit considered the decisions at length and rejected them for a number of expressed reasons. Since the language of the tariffs there employed was similar in content to that appearing in Schedules C-6 and C-9 here applicable and concurred in by petitioner (R. 81, 83-84) the reasons which impelled the appellate court in that case to reject the Commerce Commission's decisions are effective here, and nullify the effect claimed therefor by petitioner. The record here is devoid of any facts with respect to the fixing of rates which could be made applicable to the cited decisions; and certainly unwarranted assumptions may not be indulged in to arrive at such desired result.

Further, it is submitted that the *Wyman, Partridge* decisions arose out of attack before the Commerce Commission by shippers upon the lawfulness of increased rates for rail and lake transportation sought to be established by rail carriers. The proceeding was essentially one with respect to increased rates, and had

no direct relation to the insuring provisions under consideration here. Moreover, there is here no showing of connection or relation of those decisions to the present Uniform Bill of Lading which, as shown by the record, was adopted March 15, 1922, a number of years subsequent. It is submitted that the *Wyman, Partridge* decisions do not have the force or effect claimed for them by petitioner.

ARGUMENT.

POINT I.

The decisions of the courts below that the policies were issued primarily for the benefit of cargo and that underwriters through payment, are subrogated to the rights of cargo are correct.

The policies must be construed in the light of the contractual relations existing between carrier and cargo owner evidenced by the various tariffs and bills of lading under which shipments were made.

Petitioner contends that under the provisions of the contracts of carriage it assumed liability to cargo owners and shippers for all loss and damage due to perils of the sea, and that the policies of insurance were issued, not for the benefit of cargo owners, but to indemnify it against the liability so assumed.

It is both pertinent and requisite, therefore, that examination of the tariff provisions be made in order to determine who were the parties covered by the insurance policies issued "for account of whom it may concern".

A.

The tariffs obligated the carrier to provide marine insurance for cargo in return for the rate charged.

The eleven applicable tariffs (R. 77-86) are not uniform in form and content. The decision of the Circuit Court of Appeals grouped them into three classes (R. 131). For purposes of examination of the applicable provisions, that grouping is here adopted.

So classified, the first class consists of the two tariffs issued by the petitioner itself (Schedule C-1, C-2, R. 77, 78). Schedule C-1 contains the Title Page and applicable rule; Schedule C-2 contains the rule alone. The title page of Schedule C-1 contains the statement "Rates named herein include marine insurance". The effective language typical of both schedules is quoted in the decision of the Circuit Court of Appeals (R. 131).

Analyzing the language employed in this class of tariffs, it is apparent, both from title page and rule content, that the carrier held out to the shipper a positive representation that it would provide marine insurance in return for the rates charged for the transportation. The cost of procuring the marine insurance was included in the tariff rates named, and was accordingly paid by the shipper or cargo owner as a part of the transportation cost. The tariffs also provide that while shipments were carried under rates named as including marine insurance, the Transit Corporation assumed liability for loss or damage thereto caused by marine perils. This wording was determined by the Circuit Court of Appeals to constitute a waiver of the

Harter Act (Act of February 13, 1893, c. 105, 46 U. S. C. A. 190-195).

The second class of tariffs was divided by the Court into two groups. The first group includes the provisions of four tariffs (Schedules C-3, C-7, C-10 and C-11, R. 79, 82, 84-86). Each of these tariffs is a joint lake and rail tariff wherein the Transit Corporation participates in a through rate with a delivering rail carrier. Schedule C-3 (R. 79) contains the heading "Governing Marine Insurance on Rail and Lake Traffic". The other three noted tariffs each contain the heading "Marine Insurance". In each of these tariffs there is contained the statement that the lake carrier and rail carrier jointly and severally assume liability for loss or damage caused by marine perils while the goods are water borne on petitioner's vessels. It is evident that under these tariffs the cargo shipper could proceed against the initial rail carrier as provided by law; and that the tariff provisions have no application until delivery is made to the lake carrier.

In the second group, consisting of Schedules C-4, C-5 and C-8 (R. 79, 80, 82-83), the tariffs apply to various named canal and lake lines, including petitioner. Each tariff again contains the heading "Marine Insurance." In Schedule C-4, the assumption of liability provision is limited to each carrier therein named "as its interest may appear"; while in the remaining two schedules, the assumption provision applies in terms only while water borne shipments are transported on petitioner's vessels.

The third class designated by the Circuit Court of Appeals consists of Schedules C-6 and C-9 (R. 81, 83-

84). The provisions of these tariffs wholly differ from those of either the first or second class. They are applicable to various lake carriers, including petitioner. The pertinent provisions of these schedules are quoted in the opinion of the Circuit Court of Appeals (R. 131). These tariffs are explicit that the water carrier represents that the rates include marine insurance against perils of the sea. The reference to liability of the carrier plainly means the liability to procure marine insurance in return for the rates charged.

Examination of all the tariffs shows that there is contained in each some definite reference to "Marine Insurance." In two of the three groups designated by the Circuit Court of Appeals, including the first group issued by petitioner itself, there is found the express statement that the "rates named include marine insurance." In the second group, the reference is found in the heading of the tariff provisions reading "Marine Insurance."

The Circuit Court of Appeals found that:

> "These were the terms and conditions upon which appellant agreed to carry cargo and the owners would naturally conclude that their property was to be covered by policies of marine insurance" (R. 131-132).

In view of the universal custom of shippers by water to personally procure insurance or require the carrier to do so for their benefit, it is difficult to see how the Court below could have arrived at a different conclusion.

It is the contention of intervening underwriters that only a single reasonable meaning is to be ascribed to

the language respecting marine insurance. The language and phrasing constitutes an agreement upon the part of the water carrier with cargo owners and shippers, in return for the tariff rate charged for the transportation, that the carrier will procure marine insurance for the benefit of cargo against loss while water borne. The obligation imports a resort by the carrier to authorized marine underwriters for the issuance of marine insurance. To state it otherwise, the water carrier, by reason of the applicable tariff provisions, was obligated to take out policies *on cargo, for cargo, and without* further *cost to cargo;* and accordingly, the insurance obtained in furtherance of that obligation was cargo insurance quite as though cargo had itself procured the insurance. The words "Marine Insurance" wherever used import the issuance of a legal policy. The petitioner has no such power.

The Federal Court decisions cited by petitioner in support of its contention have been construed to impose upon the carrier the duty to place insurance upon the goods through the agency of underwriters, and to deliver the goods safely, or in case of loss, to deliver the insurance money collected by it as the equivalent of the loss.

In the case of *Gross v. New York & T. S. S. Co.,* (D. C.) 107 Fed. 516, it was held by Judge Addison Brown that an agreement by the carrier that a rate "would carry insurance" imposed on the carrier the duty to place insurance upon the goods and to collect it for the shipper in the event of loss. See also *Virginia-Carolina Chemical Co. v. Chesapeake Lighterage & Towing Co.,* (C. C. A. 2), 279 Fed. 684, 686.

In the case of *Southern Cotton Oil Co. v. Merchants' & Miners' Transp. Co.*, (D. C.) 179 Fed. 133, the carrier offered two rates; the higher being an "insured rate" which was paid by the shipper. The Court accepted the construction of the Gross case, *supra*, that the more natural interpretation of the obligation was an undertaking to procure insurance elsewhere, to collect it and pay the proceeds to the shipper.

The express inclusion of the cost of marine insurance as a part of the tariff rate is further persuasive evidence of the intent of the carrier to provide insurance protection for the benefit of cargo. If cargo owners and shippers pay rates which include the cost of marine insurance, surely they are entitled to the benefit of the protection of that insurance. Otherwise the expressions concerning marine insurance are devoid of meaning. The fact is unassailable that petitioner has fixed tariff rates under which it has been recompensed for the cost of procuring insurance through collection of freight moneys.

Giving effect to the determination of the Circuit Court of Appeals that the tariff schedules were so worded as to waive the Harter Act (R. 131), no valid reason exists why the tariffs should contain any reference to marine insurance unless the intendment of the carrier was to provide marine insurance for cargo.

Doubtless, the existence of the obligation furnishes the motivating reason for the issuance of the policies "for account of whom it may concern." For if the tariffs are to be construed merely as urged by petitioner, there exists no reason for the inclusion of the

"for whom it may concern" clause. The clause is meaningless unless it be construed to mean that insurance effected by and in the name of the carrier is to extend to all to whom it has represented insurance would be procured. If the tariffs were only intended to provide an assumption of liability, the policies presumably would have read "for account of itself," thereby identifying, beyond peradventure, the carrier, as the assured to whom the loss was payable.

Willamette Nav. Co. v. Hartford Fire Ins. Co., 287 Fed. 464, 466, 467 (C. C. A. 9).

B.

The policies were issued for the primary benefit of cargo.

In the opening paragraph of the policy rider form, the petitioner is named as the nominal assured, followed by the significant phrase "for account of whom it may concern." The breadth and scope of meaning of the phrase has been adjudicated by this Court.

Buck v. Chesapeake Ins. Co., 1 Pet. 151;
Hooper v. Robinson, 98 U. S. 528;
Hagan v. Scottish Union & Nat'l Ins. Co., 186 U. S. 423.

In the latter case, after quoting with approval from the statement contained in 2 Duer, Marine Insurance, page 28, with respect to the insuring clause as employed in English policies and also in this country, this Court said at page 431:

> "The English form insures the person to whom the property insured 'doth, may or shall appertain,' thus insuring the owner or one who has an interest in the property at the time when the loss

> occurs. And the author says the words 'on account of whom it may concern' have the same significance as the language used in the English form."

Further, at page 433, this Court said:

> "The words 'on account of whom it may concern' do not refer to those interested in the policy simply at the time it is taken out. The terms refer to the future. It is not a question of the persons concerned when it is taken out, but of those who may be concerned when the loss may occur, *and who were within the contemplation of him who took out the insurance at the time that he did so. It is on account of those who in the future, at the time of the happening of a loss, have the insurable interest and in regard to whom the policy will be applied.*" (Italics ours.)

To the same effect, see:

Symmers v. Carroll, 207 N. Y. 632;
Duncan v. China Mut. Ins. Co., 129 N. Y. 237.

In the case of *Symmers v. Carroll, supra*, the Court said at page 638:

> "It is sufficient if he intended to insure their interests in the cargo for their benefit and such intention is established by the words in the policy 'for account of whom it may concern.'"

The phrase "for whom it may concern" definitely imports the construction that the insurer is thereby advised of the fact that interests other than those procuring the insurance are thereby intended to be covered, and that others will be interested at the time of the occurrence of a loss. So construed in accordance with the authorities, the inclusion of the phrase "for whom it may concern" completely complements the

obligation of the tariff to furnish marine insurance, and shows that the cargo owners and shippers forwarding goods under the tariffs in question were necessarily within the contemplation of the carrier when it procured the policies of insurance. On the one hand, it had assumed the obligation to provide such insurance in exchange for payment of the rates named; while, on the other, it procured insurance for the benefit of those who paid the premium. In such case, the carrier is but a conduit through which flows payment of the obligation to make good the loss sustained. To contend otherwise is to destroy the established meaning of the "for whom it may concern" clause, and to urge a construction without reference to its fixed import.

Further, as bearing upon the holding that the policies cover cargo primarily, it is significant with respect to the policy form that the loss payable clause reads:

> "Loss, if any, payable to Great Lakes Transit Corporation, or order" (R. 63).

The incorporation in this clause of the phrase "or order" renders this form similar to that commonly used in open policies of marine insurance where certificates of insurance are issued thereunder. Thus there is provided a simple method of payment of loss by endorsement to any holder of outstanding documents. If it were not here so intended, again no reason exists for the addition of these words.

In addition, in the ensuing paragraph is found the phrase "It is agreed to hold covered * * * any cargo

per vessels sailing" (R. 63). This language is consistent only when the policies are construed as covering cargo.

Referring to the coverage clause found in the subsequent paragraph reading "and on the assured's liability to others in respect to cargo of any kind covering same from time said Great Lakes Transit Corporation becomes responsible therefor and until its responsibility ceases" (R. 63), it is submitted that, fairly construed, this clause must be read to mean that the coverage constituted insurance for others included within the "for account of whom it may concern" clause in fulfillment of the obligation to provide such insurance under the contracts of carriage. Both the lower courts correctly treated the clause as indicating an intent to thereby protect the cargo owner and shipper (R. 107, 133).

In the latter part of the same paragraph is found this expression: "Also to cover through to destination goods delivered by the Assured to other water transportation companies for shipment to destination" (R. 64). The Circuit Court of Appeals failed to comment thereon in its review of policy provisions. However, the clause seems to plainly point to a single meaning: that of coverage of cargo after leaving the possession of the Transit Corporation. If this be true, must not cargo necessarily be the subject of policy coverage while the goods are still in the carrier's possession?

Reliance placed by the petitioner upon the clause reading "The Assured taking upon themselves as to

said cargo or parts thereof * * * the insurance of said cargo against perils of the seas and lakes" etc., was properly rejected by the Circuit Court of Appeals for the reason (R. 133):

> "But this clause does not avail appellant because it did not take upon itself the insurance of cargo or assume any liability with reference thereto as an insurer. Its obligation as to insurance went no further than to require it to procure policies of insurance from others."

It is submitted that this holding is in accord with the adjudicated cases and results from the natural interpretation of the obligation.

In the paragraph printed at top of page 65, there appears this language: "and for any and all claims which said cargo may be called upon to contribute in general average." In view of the determination that petitioner had waived the Harter Act, the liability of the petitioner must be that liability existing for water carriers prior to the adoption of that statute. But "a carrier is not an insurer, though often loosely so called. The extent of his responsibility may be equal to that of an insurer and even greater but its nature is not the same." *Hall v. Nashville & Chattanooga R. R. Co.*, 13 Wall. 367; *The Niagara v. Cordes*, 21 How. 7. Apart from the Harter Act, the owner of the ship is not entitled to general average contributions where the loss is sustained through negligence or fault of those for whom he is responsible. *The Irrawaddy*, 171 U. S. 187. The policy provision with respect to indemnity for claims for General Average contributions speaks only with reference to cargo and not with respect to the petitioner's assumption of liability.

Mention was made by the Circuit Court of Appeals of the standard form of "sue and labor" clause contained in the policy (R. 66). It is submitted that it is possible under the authority granted by this clause, to defend, safeguard or recover insured *property only*. Clearly the clause would be mere surplusage if the liability of the carrier was alone insured.

A further reason supports the contention. There exists a clear distinction between a promise to personally indemnify another and a promise to take out and collect insurance for him. An important consequence of the distinction appears in case the promisor becomes insolvent before the loss occurs. In the first case, the insured would have merely a general claim against the insolvent owners and could not pursue their underwriters for he is not in privity with reinsurers. Such reinsurance would benefit only the reinsured as indemnity against loss under the settled principle that the proceeds are assets distributable generally, against which the insured has no special equitable claim.

U. S. v. Federal Surety Co., 72 F. (2d) 964, 967, and cases cited (C. C. A. 4); cert. denied 294 U. S. 711.

Such a dismal and barren result could scarcely be within the contemplation of cargo owners and shippers. On the contrary in the second case, in the event of insolvency of the carrier, cargo owners and shippers may recover the amount of their loss directly from the insurers and are not relegated to a general claim against the carrier.

Young v. St. Paul Fire & Marine Ins. Co., 204 App. Div. 807, (1st Dept.) aff'd. no opinion, 236 N. Y. 665.

The conclusion of the Circuit Court of Appeals was manifestly correct in deciding (R. 133);

> "We think the parties could not have failed to understand that these policies were issued primarily for the benefit of cargo and that the payments made and to be made by the underwriters were in settlement of their liability to cargo owners".

C.

Underwriters are entitled by subrogation to all the rights of cargo owners.

It is settled law that marine underwriters, by payment of a loss, become by operation of law and without assignment subrogated to all the rights of the insured in regard to that loss.

The Potomac, 105 U. S. 630, 634;
Liverpool, etc., S. S. Co. v. Phenix Ins. Co., 129 U. S. 397, 462;
Federal Ins. Co. v. Detroit Fire & Marine Ins. Co., 202 Fed. 648, 651 (C. C. A. 6); cert. denied 229 U. S. 620.

And it is equally well settled that the underwriters were entitled to intervene herein to enforce the right so acquired by subrogation.

The Atlas, 93 U. S. 302, 316;
The New York, 175 U. S. 187, 209;
Federal Ins. Co. v. Detroit Fire & Marine Ins. Co., supra.

Petitioner concedes at page 22 of its Brief that unpaid cargo owners "had an action directly" against the "King" and her owner when petitioner began suit.

That those cargo owners possessed such a cause of action against the non-carrying vessel is clearly the case as shown by our argument. That cause of action directly against the "King" arose out of the occurrence of the collision and was common to all cargo owners and shippers whose shipments thereby suffered damage. The right plainly ensued from the wrong doing and was susceptible of enforcement by *all damaged* cargo owners and shippers. Being thus fixed by the occurrence of the loss, the remedy for the enforcement of the right could not thereafter be abrogated, nullified or destroyed by the act of petitioner through the making of payments out of its own funds, and in thus seeking to deal with the liability as one for cargo loss and so prevent operation of the underwriters' right of subrogation. The rejection by the District Court of petitioner's contention based on this act of payment (R. 108) was clearly correct and is completely justified by the statement in petitioner's brief.

POINT II.

Assuming that the Transit Corporation was also an insured under the policies, the decree below is correct and intervening underwriters are entitled to subrogation.

That petitioner, as a carrier, possessed an insurable interest in the shipments entrusted to its care may not be doubted. Such interest is similar to that of warehousemen, factors and other bailees and trustees of goods entrusted to their care. The excerpt quoted at page 21 of Petitioner's Brief from the opinion of this Court in the case of *Hooper v. Robinson, supra,* clearly

demonstrates the distinction existing between insurance covering a carrier "to the extent of his own interest in that to which such interest relates", and insurance operating through the clause "on account of whom it may concern" for all others to the extent of their respective interests.

Applied to the policies under consideration, it would seem to follow that although the petitioner, who had assumed the liability of a common carrier, was the nominal assured named in the policy and was included within the policy coverage as to the liability so assumed; nevertheless that the policy coverage operating through the clause "for account of whom it may concern", both by intendment and expression, is to be construed as extending to and covering all those possessing an insurable interest in the goods damaged at the time of loss. So construed, the results of the distinction are readily apparent and unmistakable.

The essential fact, wholly disregarded by petitioner, is that the cause of action here sought to be enforced does not proceed upon a claim of breach of the contract of carriage. The action is not sought to be maintained against petitioner. No claim is made against petitioner on behalf of cargo by pleading or otherwise. The record is barren of any suggestion by cargo or anyone that the "Dixon" or her owner was liable for the sustained loss and damage because of any breach of the contract of carriage.

On the contrary, the cause of action sought to be enforced plainly proceeds in negligence. Satisfaction is sought of cargo's remedy arising from the collision di-

rectly against the "King" and her owner "in a cause of collision". Fault and negligence upon the part of the "King" in causing the collision and resultant cargo damage is the gravamen of the cause of action asserted on behalf of cargo by the petitioner's libel "as carrier and/or bailee of cargo" (R. 10-13). Additional emphasis to this allegation is lent by reiteration thereof appearing in the intervening petition of underwriters (R. 42-46). Similar contention was urged in cargo's behalf with respect to the form of the decree under consideration (R. 104-105) and has been since adhered to.

If the case be regarded as one wherein cargo owners and shippers were the actual libelants in their own right, can there be any doubt of the right of cargo owners to enforce their remedy and maintain their cause of action as against the "King" for negligence and to recover their full damage therefor? Obviously not, for it is the settled principle stated by this Court that innocent cargo owners and shippers are entitled to full compensation for the damage sustained by their shipments; and under a mutual fault decision, may recover their entire damage from the non-carrying vessel, leaving it in turn to recoup one-half the amount from the carrying vessel.

The Atlas, 93 U. S. 302;
Aktieselskabet Cuzco v. The Sucarseco, 294 U. S. 394.

The right of cargo to recover for negligence which caused the collision was established prior to the intervention of these underwriters. Upon intervention the underwriters did not, and could not, assert any other

or different liability or cause of action. They merely stepped into cargo's place to receive the recompense which the Court had already determined cargo was entitled to. If cargo owners and shippers were insured to the extent of their interest, as heretofore demonstrated, it follows that the question with respect to subrogation must be affirmatively answered. For upon payment of cargo loss and damage, intervening underwriters became the cargo owners and shippers for the purpose of enforcing the cause of action already maintained in behalf of cargo, viz., that for negligence resulting in the destruction and loss to cargo.

It being thus evident that the cause of action here proceeded upon is based upon negligence, and not at all upon claim of breach of contract of carriage by the carrying vessel, petitioner's argument that subrogation of intervening underwriters to the rights of cargo would not result even though the policies be considered as being for the benefit of cargo owners, is beside the point.

The case of *Wager v. The Providence Insurance Co., et al.*, 150 U. S. 99, relied upon by petitioner, fails to establish the contention. That was an action brought by underwriters claiming subrogation through payment, against Morse & Co., and Wager as carriers. Both respondents signed the bill of lading issued to cargo owners. Wager was the actual carrier of the goods transported upon his vessels. Morse & Co., possessed an open policy of insurance reading "for account of whom it may concern"; and prior to shipment procured issuance of a certificate thereunder to themselves as the insured, and paid the premium therefor. Cargo

damage and loss ensued through negligent management of the carrying vessels. The insurers thereupon paid the loss.

The decision referred to was the final determination in a prolonged litigation. Reference is made thereto for proper understanding. Following the loss and payment, the insurers, claiming subrogation, instituted action *in rem* against the carrying vessels. The case proceeded for negligent navigation and management resulting in the destruction of the cargo, to which libelants had become equitably entitled through payment. A decree for full recovery by libelants was ordered by reason of the determined negligence. *The Sydney*, 27 Fed. 119.

Appeal from that decree was dismissed by this Court for want of jurisdiction. *The Sydney*, 139 U. S. 331.

As was subsequently noted by this Court (150 U. S. 99, 111) that decree in favor of subrogated underwriters based upon the determined liability because of negligence of the carrying vessels and of Wager, their claimant, remained unreversed and in full force.

Seemingly because insufficient moneys to satisfy that decree were realized through condemnation and sale of the carrying vessels under the direction of such decree, a second action was brought by underwriters against Morse & Co., and Wager as carriers. The proceedings in that action resulted ultimately in the determination of this Court first referred to (150 U. S. 99).

All that was held with respect to Morse & Co., by the decision relied upon, was that the underwriters could not recover back from Morse & Co., the moneys

paid since Morse & Co., were the insured named in the certificate issued covering the cargo shipment; and because they were without obligation to transfer the policy to cargo owners or make it payable to them in case of loss. Affirmance of the decreed dismissal of the libel as against Morse & Co., was accordingly directed. That decision plainly turned upon the fact that Morse & Co., was "actually and in terms the party insured" because the certificate, issued at its behest and upon its payment of premium, named it as the assured and did not name any other interest therein. Furthermore, the liability sought to be enforced against Morse & Co., was not a liability for negligence, but was a liability for breach of contract of carriage which liability was expressly covered by the policy. Thus understood, the decision fails to lend support to petitioner for the reasons hereinbefore discussed.

It remains to be suggested with respect to the action as against co-respondent Wager, who was the actual carrier, that the decision of this Court further affirmed the decree obtained below by subrogated underwriters against Wager *in personam*. This affirmance rested upon the ground that the Court below properly decided that Wager was concluded by the decree rendered in the former case; and that accordingly further decree in favor of underwriters against Wager was proper. It thus clearly appears from the decision with respect to Wager that the underwriters, standing in the right of cargo owners through payment, could enforce to full recompense all the remedies cargo possessed against the carrying vessels and against their owner who had contracted for the carriage, because of negligence creating the loss. The distinction is both obvious and controlling.

POINT III.

The liability for a moiety decreed against petitioner and its steamer "George D. Dixon" is not a liability with respect to cargo, but is a liability arising out of the relation of the two colliding vessels to each other.

In the instant cause, neither in the decision of the District Court, nor in the opinion of the Circuit Court of Appeals, has it been held that the rights of cargo acquired by intervening underwriters through payment are enforced against petitioner by reason of breach of contract, or that petitioner has been held liable as a carrier of cargo.

Rather, the decree under consideration is based upon the following principles: That two vessels colliding as the result of mutual fault are joint *tort feasors;* that, as between themselves, each vessel is required to bear one-half of all loss or damage arising from the collision as to which *either* of them is legally liable and that with all parties in Court the amount of damage is equally apportioned and recovery decreed of one-half the amount of such loss and damage against each vessel; that with but one offending vessel before the Court the apportionment for mutual fault cannot then be made, but is apportioned in further proceedings for contribution from the remaining offending vessel.

As before pointed out, in cases of collision due to mutual fault, innocent cargo may proceed alone against the non-carrying vessel and recover from her *in solido* the entire amount of cargo damage.

The Atlas, supra;
The New York, 175 U. S. 187, 209, 210;
Canada Malting Co. v. Paterson Steamships, 285 U. S. 413, 418.

If, in such cases of mutual fault, both parties liable are before the Court, recovery is directed against each for a moiety of the loss and damage sustained by innocent cargo, with an alternative right of recovery from either of any balance uncollectible from the other.

The Alabama and The Gamecock, 92 U. S. 695;
The Virginia-Ehrman, 97 U. S. 309;
The City of Hartford, 97 U. S. 323.

Recovery in full by cargo in cases of mutual fault under the doctrine of *The Atlas, supra,* is decreed against the non-carrying vessel even though the carrying vessel be freed from liability to cargo by reason of the application of the Harter Act.

Aktieselskabet Cuzco v. The Suearseco, supra.

For, on a division of the entire damages between the two vessels, the non-carrying vessel may recoup one-half of the amount paid to cargo.

The Chattahoochee, 173 U. S. 540.

In that case, where mutual fault was decreed in the lower courts and affirmed by this Court, the argument against the asserted right of recoupment of one-half the cargo damage from the carrying vessel was based upon the claim that such result violated the exempting provisions of the Harter Act with respect to the carrying vessel. In overruling this claim, this Court held at page 555 that "the relations of the two colliding vessels to each other remain unaffected by this act, notwithstanding one or both vessels be laden with a cargo". The decree below was accordingly affirmed.

Similar contentions, made with respect to the effect of the Harter Act upon the question of distribution of

damages in a case of collision arising from mutual fault, were likewise overruled by the Sixth Circuit Court of Appeals; certiorari being thereafter denied by this Court.

The George W. Roby, 111 Fed. 601, (C. C. A. 6); cert. denied, 183 U. S. 699; 184 U. S. 698.

In that case, the Circuit Court of Appeals said at page 621:

> "In other words, the right of recoupment does not depend upon the relation of the carrying vessel to her cargo, but upon the relation of the colliding vessels to each other".

The direct liability of the non-carrying vessel for all the damage to cargo is "one of the consequences plainly to be foreseen", and the responsibility of the carrying vessel to the non-carrying vessel is measured accordingly.

Erie R. R. Co. v. Erie & Western Transp. Co., 204 U. S. 220, 226.

In that case, the owner of the non-carrying vessel was decreed recovery against the owner of the carrying vessel in a suit for contribution of one-half the amount of cargo damage paid by the non-carrying vessel under the prior decree holding both at fault. This Court said at page 226:

> "And it is established, as it logically follows, that the division of damages extends to what one of the parties pays to the owners of cargo on board the other. The Chattahoochee, 173 U. S. 540, 43 L. ed. 801, 19 Sup. Ct. Rep. 491. The right to the division of the latter element does not stand on subrogation, but arises directly from the tort. The

> liability of the New York, under our practice, for all the damage to cargo, was one of the consequences plainly to be foreseen, and, since the Conemaugh was answerable to the New York as a partial cause of the tort, its responsibility extended to all the manifest consequences for which, on the general ground that they were manifest, the New York could be held".

Applying these established principles to the instant case, it appears that by virtue of their right of subrogation intervening underwriters were entitled to recover full cargo damage; that since the "King" had seized upon the procedure authorized by the 56th Admiralty Rule and had impleaded the owner of the "Dixon" as being at fault with respect to cargo damage, and the Court had determined each vessel mutually, at fault as the result of the trial, the ultimate result of the fixation of the rights of the parties was to be decreed, and the damage to cargo accordingly apportioned between the offending vessels by awarding a decree for a moiety against each.

Here, petitioner, in its representative capacity for the benefit of cargo, sued the "King" as alone at fault. The "King" then pleaded against the owner of the "Dixon" with respect thereto under the 56th Admiralty Rule. At trial, the case stood with both parties before the Court but with no issue of pleading as between cargo and the "Dixon", for cargo failed either to adopt the "King's" allegations of fault against the "Dixon" or to itself affirmatively assert fault against the "Dixon". Cargo thus exercised its right not to proceed against the "Dixon".

Jensen v. Bank Line, Ltd., 26 F. (2d) 173, 175 (C. C. A. 9).

Though the "King" was thus liable to cargo for its full damage, since the owners of the "Dixon" were also before the Court through effective pleading of the "King" and mutual fault was found, the "King" was entitled to contribution from the "Dixon" for a moiety of the damage for which the "King" was liable. The Court thereupon decreed the ultimate and directed a direct payment by each guilty vessel of a moiety under circumstances which would have otherwise required the "Dixon" to pay a like amount to the "King."

In such cases where all parties are before the Court the decree, in avoidance of circuity, may fix the ultimate liabilities and require each vessel to pay a moiety.

The Cockatoo, 61 F. (2d) 889 (C. C. A. 2); Cert. denied 287 U. S. 669.

In that case, the Second Circuit Court of Appeals said at page 892:

> "In reason it can make no difference whether the non-carrying vessel recoups itself out of money due from the carrying vessel as was done in The Chattahoochee or recovers the amount of contribution affirmatively as in Erie R. R. Co. v. Erie Transportation Co. In either case, the property of the non-carrying vessel is used to liquidate one-half of the claim of the cargo, and by either mode of satisfying the claim the carrying vessel is subjected (whether directly or not) to liability for one-half the damages suffered by the cargo.
>
> Nor can it make any difference whether the cargo recovers its full claim against the non-carrying vessel and she recovers half against the carrying vessel, or whether, as here, the Court decrees that the cargo recover half damages against each vessel." • • •
>
> "The liability to contribute imposed under the rule of The Chattahoochee and further extended

> by Erie R. R. Co. v. Erie Transportation Co., originates in the law of torts as applied by the maritime law, and is not affected by the terms of the Harter Act."

It follows that the claim for cargo loss and damage results directly from the tort of collision. When the joint tort feasors are each decreed to respond for a moiety of the loss and damage sustained by cargo, they necessarily do so in response to the joint and several obligations imposed on them by reason of the maritime tort.

It thus appears that the "Dixon" has been decreed to pay, *not a liability with respect to cargo*, but, in effect, a liability arising solely out of the relation of the two colliding vessels to each other. The decreed payment by the "Dixon" to cargo is merely the result of procedural convenience since such payment represents the distribution of justice among those responsible for the tort, and is made without reference to the relation of the carrying vessel to her cargo.

If the reasoning here urged upon the cited authorities is correct, then petitioner's further argument must necessarily fail for in no event is the liability here decreed against the "Dixon" one covered by the policies, but rather it is a liability to respond to another vessel in half damages for all cargo loss resulting from the mutual fault causing the collision and resultant loss.

Moreover, the argument of petitioner goes to the same end as was contended for by the respondent in resisting the claim for contribution asserted in the

case of *Erie R. R. Co. v. Erie & Western Transp. Co., supra.* In overruling the contention there made, this Court said at page 226:

> "Therefore, the contract relations between the Conemaugh and her cargo have nothing to do with the case. See The Chattahoochee, *supra.* More, specifically, the last named vessel's liability to the New York is not affected by provisions in the Conemaugh's bills of lading, giving her the benefit of insurance, and requiring notice of any claim for damage to be made in writing within thirty days, and suit to be brought within three months."

The Sixth Circuit Court of Appeals likewise disposed of the similar contention in the case of *The George W. Roby, supra,* where it was said at page 621:

> "Neither one of these stipulations has any bearing upon any question here presented. Neither cargo owners nor cargo underwriters are endeavoring to hold the Florida liable for cargo losses. The right of recoupment, which we hold to exist in favor of The Roby, by which one-half of the decree against her for cargo loss on the Florida has been set off against the decree against The Roby for one-half the value of the Florida, does not depend upon the liability of the Florida for cargo damages, but rests upon the liability of the two colliding vessels to bear equally the burden resulting from a collision due to their mutual fault. • • • The answer to the objection now under consideration is that the Florida has not been held liable to cargo owners, and, therefore, the bill of lading stipulations have not come into effect."

It results that, in avoidance of circuity, the decree below does substantial and direct justice between all the parties in keeping with the determination of mutual fault.

CONCLUSION.

The order and decree of the Circuit Court of Appeals affirming the interlocutory decree entered in the District Court with respect to the decreed recovery in favor of Atlantic Mutual Insurance Company and other similarly situated underwriters should be affirmed with costs.

Dated, March 31st, 1937.

Respectfully submitted,

RAY M. STANLEY,
ELLIS H. GIDLEY,
Counsel for Atlantic Mutual Insurance Company, et al., Respondents-Intervening-Underwriters.

SUPREME COURT OF THE UNITED STATES.

No. 716.—October Term, 1936.

Great Lakes Transit Corporation, Petitioner, *vs.* Interstate Steamship Company and Atlantic Mutual Insurance Company, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[June 1, 1937.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

A collision occurred in the St. Clair river between the vessel "George D. Dixon" owned by the petitioner, Great Lakes Transit Corporation, and the vessel "Willis L. King" owned by the Interstate Steamship Company. Each owner brought a libel in admiralty against the other. The suits were consolidated. The Atlantic Mutual Insurance Company and other underwriters having paid to the petitioner, under insurance policies procured by it, the amount of cargo damage and loss which petitioner had paid to owners of the cargo carried by the "Dixon", intervened and claimed the right through subrogation to recover the amount thus paid from the Interstate Steamship Company and its vessel, the "King".[1]

The District Court entered a decree adjudging both vessels at fault and that the intervening underwriters should recover from each of the vessels and their respective owners a moiety of the amounts paid and payable under the policies. The decree was affirmed by the Circuit Court of Appeals. 86 F. (2d) 740. In view of the importance of the issue, certiorari was granted, limited to the question of the correctness of the decree in directing recovery from the petitioner. March 8, 1937.

Petitioner's contention is that the insurance policies were contracts between the underwriters and the petitioner under which

[1] The underwriters' claim also covered such additional amounts as they would be called upon to pay as further damages and losses to cargo were ascertained and were paid by petitioner.

the latter was entitled to be indemnified for the liability it had assumed under its bill of lading and its tariff provisions; that the underwriters were not entitled to recover back from petitioner what they had paid it in discharge of their obligation. The underwriters insist that their policies insured cargo and that their payments were made for cargo's benefit; that, the cargo damage and loss having been paid, they were entitled by subrogation to a decree for the full damage against the "King"; that as both vessels were at fault the "King" was entitled to contribution from the "Dixon", and that the decree in-avoidance of circuity had fixed the ultimate liabilities by requiring each vessel to pay a moiety.

The cargo on the "Dixon" was carried under uniform bills of lading, approved by the Interstate Commerce Commission, which after referring in Section 9 (a) to the exemptions contained in the Harter Act (46 U. S. C. 190 *et seq.*), provided in Section 9 (e) as follows:

"If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this bill of lading".

The court below concluded, and we think rightly, that by the applicable tariffs the petitioner waived the saving clauses of the Harter Act and assumed full liability to the cargo owners for loss or damage caused by marine perils.[2] While these tariffs were not uniform they also either stated or fairly imported that the specified rates should include marine insurance.

The policies of insurance had the following rider, by which the underwriters agreed to insure the Great Lakes Transit Corpora-

[2] It is sufficient, for the present purpose, to quote the following from one of these tariffs filed by the petitioner:

"Rule No. 15.—Marine Insurance.—Rates Named Herein Include Marine Insurance.—While shipments subject to rates named herein as including Marine Insurance are water-borne at and between lake ports, on the vessels of the Great Lakes Transit Corporation, said corporation assumes liability for loss or damage to said shipments caused by marine perils, to wit: Of the seas and lakes, fire, collision, stranding, jettisons, pirates, assailing thieves, barratry of the master or mariners and all other perils or misfortunes that have or shall come to the hurt or damage of said property, or any part thereof, including general average charges and expenses for which the owner may, under the Maritime Law, be chargeable, but excluding the risks of riots, war or insurrections; any loss from said marine perils for which said Corporation is liable hereunder, to be paid sixty days after proof of loss and proof of interest in said property have been furnished".

tion, for account of whom it may concern, loss, if any, to be payable to the Great Lakes Transit Corporation or order,—

"On cargo of any kind owned by the Assured and on the assured's liability to others in respect to cargo of any kind covering same from time said Great Lakes Transit Corporation becomes responsible therefor and until its responsibility ceases, wheresoever the same may be, including risks while on docks, in and/or on cars on docks, piers, wharves, lighters and/or craft, transfers, and all land conveyances, and also to cover upon any advances made by and payment of back charges made by or due from said Assured, and upon any charges of said Assured upon any and all cargo or any portion thereof; from the time the Assured becomes responsible for such cargo including risks of trans-shipment, and under and/or on deck on board of the Assured's steamers:

. . . . . .

"Also to cover through to destination goods delivered by the Assured to other water transportation companies for shipment to destination".

The policies further provided that, the Assured taking "all the risks, perils and liabilities which by law a common carrier by land or water assumes, and also the insurance of said cargo against perils of the seas and lakes" etc., the Assurers agreed "to indemnify and hold harmless" the Assured against any loss or damage to cargo from all such risks, perils, etc., "to the extent which the Assured may be held by the owners thereof, under any liability the Assured shall have assumed as common carriers, insurers or otherwise".[3]

We are unable to accept the view that the provisions we have quoted cannot avail petitioner "because it did not take upon itself

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[3] The text of the provision referred to is as follows:

"It is agreed between the parties hereto that said steamers are to be employed in carrying cargo, or cargo and passengers, in and on said steamers as aforesaid, the Assured taking upon themselves as to said cargo, or parts thereof, all the risks, perils and liabilities which by law a common carrier by land or water assumes, and also the insurance of said cargo against perils of the seas and lakes, fire, jettisons, barratry, negligence of master or mariners, loss or damage arising through explosions howsoever or wheresoever occurring, bursting of boilers, breakage of shafts or through any latent defect in the machinery or hull, and all other acts, perils or misfortunes that have or shall come to the hurt, detriment, damage to or loss of the said cargo or any part thereof, and the said Assurers agree and undertake to indemnify and hold harmless the said Assured against hurt, detriment, damage to or loss of such cargo from any and all such risks, perils, acts or misfortunes, to the extent which the Assured may be held by the owners thereof, under any liability the Assured shall have assumed as common carriers, insurers, or otherwise, and for any and all claims which said cargo may be called upon to contribute in General Average, and/or for salvage, landing, warehousing and/or special charges, and to cover in like manner duties and any cargo owned by the Assured, and also all advances made by and payment of back charges made

the insurance of cargo or assume any liability with reference thereto as an insurer"; that "its obligation as to insurance went no further than to require it to procure policies of insurance from others". Petitioner did more than agree to obtain marine insurance. Petitioner by its tariffs waived the provisions of the Harter Act and became itself an insurer of the cargo against marine perils. The agreement to obtain marine insurance did not detract from that undertaking. Had the underwriters been unable to respond to their contracts, petitioner would still have been liable to the cargo owners upon its own engagement. Having assumed that liability, petitioner was undoubtedly entitled to take out policies for its own protection. See *Wyman, Partridge & Co.* v. *Boston & Maine R. Co.*, 13 I. C. C. 258, 262; 15 I. C. C. 577, 581; 19 I. C. C. 551, 553. It is a familiar rule that a common carrier "whether liable by law or custom to the same extent as an insurer, or only for his own negligence, may, in order to protect himself against his own responsibility, as well as to secure his lien, cause the goods in his custody to be insured to their full value". *Phoenix Insurance Co.* v. *Erie Transportation Co.*, 117 U. S. 312, 323, 324, and cases there cited. "I see nothing remarkable", said Lord Chief Justice Russell in *Hill* v. *Scott*, L. R. 2 Q. B. D. 371, 375, "in the shipowner insuring himself. In a case where there was a bill of lading with widely sweeping exceptions, no doubt it would be unnecessary; but where, as here, there is no bill of lading, the shipowner frequently effects an insurance in order to protect himself against liability". See, also, the same case, on appeal, *Id.*, pp. 713, 714.

The policies issued to petitioner explicitly afforded the protection which the petitioner was entitled to seek by virtue of the risks it had assumed. The petitioner was the "Assured" named in the policies. Their terms contemplated that the assured as a common carrier would take upon itself full liability to the cargo owners for all damage and loss due to perils of the sea and the underwriters expressly agreed to indemnify the assured against that liability. There is no admissible construction of the policies which can eliminate or frustrate that undertaking. In its presence, if

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by or due from said Assured and/or charges of said Assured upon any and all cargo or any portion thereof.

"In case of loss, such loss to be paid thirty days after proof of loss and proof of interest are furnished to this company. There shall, however, be deducted from the aggregate of all claims on each east bound or west bound passage, the sum of $1,000".

ambiguities are raised by other clauses, they must be resolved so as still to give effect to the dominant purpose which the policies clearly reveal.

The fact that the policies insured the petitioner, Great Lakes Transit Corporation "for account of whom it may concern" and that the loss was payable to the Great Lakes Transit Corporation "or order" did not alter the fact that the Great Lakes Transit Corporation was itself directly concerned or detract from the stipulation running to that corporation as a carrier and affording it the specified indemnity. Nor does the fact that the cost of the insurance was included in the carrier's rate affect the question. The rate would properly cover all the reasonable expenses incident to the transportation, and when the carrier assumed liability to the cargo owners for damages and losses caused by marine perils, there was nothing unreasonable in the carrier's protecting itself against that risk by procuring insurance and covering the cost in its rate. Compare *Wyman, Partridge & Co.* v. *Boston & Maine R. Co., supra.* And if it be assumed, as we do assume, that the insurance would inure to the benefit of the cargo owners, that would be a protection to those owners additional to that afforded by the carrier's own engagement which still remained effective and covered by the stipulation in the policies for the benefit of the carrier. By reason of that coverage the underwriters were bound to pay, and did pay, to the petitioner, the amounts which the latter became liable to pay and had paid to the cargo owners under the contracts of carriage.

These payments having been made, the underwriters now seek to recover back from the petitioner a moiety of what they have paid to it. It is said that this results from the admiralty rule for a division of damages in case of fault on the part of both vessels involved in the collision, and that the decree for a recovery by the underwriters from the petitioner is for the purpose of avoiding circuity of action. The effect none the less is to enable the underwriters to get back one-half of the amounts they had expressly agreed to pay to petitioner for its indemnity.

The underwriters seek to sustain the decree by invoking the doctrine of subrogation, but the equity of subrogation invests the underwriters with the rights of the assured against third persons (*Phoenix Insurance Co.* v. *Erie Transportation Co., supra; Wager* v. *Providence Insurance Co.*, 150 U. S. 99, 108; *Standard Marine Insurance Co.* v. *Scottish Insurance Co.*, 283 U. S. 284, 286) not

with a right to override its own obligation to the assured. Thus, when a bill of lading provides that in case of loss the carrier, if liable therefor, shall have the full benefit of any insurance effected upon the goods, the provision limits the right of subrogation of the insurer, upon payment to the shipper, to recover over against the carrier. *Phoenix Insurance Co.* v. *Erie Transportation Co., supra; Wager* v. *Providence Insurance Co., supra.* Such a clause giving the carrier the benefit of insurance effected by the shipper is valid "because the carrier might himself have insured against the loss, even though occasioned by his own negligence, and if a shipper under a bill of lading containing this provision effects insurance and is paid the full amount of his loss, neither he nor the insurer can recover against the carrier". *Luckenbach* v. *McCahan Sugar Co.*, 248 U. S. 139, 146. Following the same reasoning, we have said that "If a valid claim by the underwriter to be subrogated to the rights of the owner will not arise where the carrier has contracted with the owner that he, the carrier, shall have the benefit of any insurance, it would seem to be clear that where the carrier is actually and in terms the party insured, the underwriter can have no right to recover over against the carrier, even if the amount of the policy has been paid by the insurance company to the owner on the order of the carrier". *Wager* v. *Providence Insurance Co., supra,* pp. 108, 109. See, also, *The John Russell,* 68 F. (2d) 901, 902.

Construing the policies in this instance as indemnifying the carrier against the liability which it had assumed by its bills of lading and tariffs to the cargo owners, the payments by the underwriters operated as a discharge of their obligation to the carrier and while, as the cargo owners had the benefit of the insurance, the underwriters could be subrogated to the right of the cargo owners against the "King", they could not use that right to recover over against the carrier in defiance of their own stipulation. They could recover against the "King" the moiety for which the "King" was liable but could not recover against the petitioner. The procedure in admiralty did not affect the substantive rights established by the policies.

The decree of the Circuit Court of Appeals is reversed and the cause is remanded for further proceedings in conformity with this opinion.

It is so ordered.